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PRACTICE REPORTS

IN THE

*June 14*

SUPREME COURT<sup>6</sup>

COURT OF APPEALS.



~~~~~  
BY NATHAN HOWARD, JR.  
COUNSELLOR AT LAW, ALBANY.  
~~~~~

SECOND EDITION.

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## PREFACE.

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THE organization of the Judiciary and Courts under the amended Constitution of 1846, as now existing, renders it proper that the *title* of this work should be changed. It will, therefore, hereafter be called PRACTICE REPORTS, instead of SPECIAL TERM REPORTS.

It is not designed to change the character or plan of the Reports, any further than to introduce therein any and every *improvement* which may be suggested, or appear to the author from time to time. The object of the work to be, as it has ever been designed to be, strictly and purely *Practice Reports*.

The opinions or statements on points decided, in every case, will be taken, (as heretofore) as far as possible, directly from the judges or justices themselves, and much care and pains will be taken to have them published *correctly*. In the correctness of head notes the author is, of course, alone responsible; and in endeavoring to bring out clearly and succinctly in them the points or principles contained in each particular opinion or case, it will be his design and purpose to fix the whole subject in his own mind as strongly as possible, that he may recognize any similar principle or point which may have been before decided and published, and make a proper reference thereto.

These Reports will be confined altogether to cases arising in the Supreme Court and Court of Appeals. They will be published in numbers as heretofore; and it is the design to issue one volume per year, which will contain about four hundred and fifty pages. The Third Volume of the Special Term Reports, just issued, may be considered a fair sample of future volumes of the Practice Reports, as to execution.

The numbers cannot be issued uniformly every month, although it is the design to have them so issued. Various circumstances occur, which sometimes prolong the issuing of a number beyond the prescribed time; but, in all such cases, it will be enlarged proportionably.

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# PRACTICE REPORTS.

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## SUPREME COURT.

CORNELIUS L. ALLEN agt. SOLOMON ACKLEY and DAVID W. ACKLEY.

This court has the *power* to allow a defendant to put in an answer, if he has neglected to answer within the twenty days prescribed by the code.

At the adoption of the code this power of relief formed a part of the acknowledged jurisdiction of the court, which it derived from the common law, and it being highly beneficial, if not indispensable in the administration of justice, and there being no negative words in the code depriving the court of its exercise, *held*, that it was evident that the Legislature did not intend to deprive the court of the necessary and indispensable power of relieving parties in proper cases from the unjust and ruinous consequences of a failure to answer within the time required by the code.

The case of extending the time for bringing an appeal is not analogous to the case of relieving from the effect of defaults in not pleading or answering in time. The power of appealing is derived wholly from the statute. The power of the court to relieve against a default in the progress of a cause, is derived from the common law.

*Special Term, Washington county, February, 1849.* Motion to set aside judgment, and to allow defendants to put in answer.

The summons and complaint were served on the defendants on the 29th and 30th of December, 1848, personally. The answer was served by depositing the same in the post office at Troy, on the 21st January, 1849, directed to the plaintiff. The answer was returned upon the ground that it was not served in time. Judgment was entered by the clerk on the 23d day of January, 1849. The defendant, D. W. Ackley, swears that he made no memorandum of the time of service of the summons and complaint, and when he sent word to his attorney of the commencement of the suit, he was under the impression that the time for answering expired on the 21st January, 1849. The attorney of the defendants states that

when the summons and complaint were handed to him he was informed that they were served on the 1st January, 1849. The action was brought for services rendered by the plaintiff as solicitor and counsel for the defendants.

J. HOLMES, *for defendants.*

C. L. ALLEN, *in pro. per.*

PAIGE, Justice.—The question presented on this motion is, whether the court has power to allow the defendants to put in answer, they having neglected to answer within the twenty days prescribed by the code. It is insisted that as the code limits the time for putting in an answer, the court has no power to let the defendants in to make a defence. And has no power to enlarge the time within which an act is to be done, when such time is fixed by statute. (5 Wend. 136; *Jackson v. Wickkam*, 10 Paige, 616.)

The code (sec. 107) provides that the summons shall require the defendant to answer the complaint and serve a copy of his answer, &c., within twenty days after the service of the summons, and § 121 declares that the answer must be served within twenty days after service of a copy of the complaint. Section 202 authorizes, in an action on contract for the recovery of money, a judgment to be entered by the clerk on the failure of the defendant to answer. If these provisions of the code deprive the court of the power to relieve the defendant from the consequences of a failure to answer within the time prescribed, in cases of mistake, inadvertency, surprise or excusable neglect, great hardship and injustice will be the result. The power of a court to relieve a defendant in such cases has always been deemed a salutary power; a power even indispensable in the administration of justice. No complaint was ever made of either the possession of this power by the court or of the manner of its exercise. I cannot believe, therefore, that the commissioners on practice and pleading, or the Legislature in reporting and adopting the code, intended to take this power from the court. Is the language of the code so clear and unambiguous that we are compelled to deduce from it an intention on the part of the Legislature to take from the court this power, which, as a part of its common law jurisdiction, it has possessed and exercised from time immemorial?

In construing one part of the statute, the whole statute is to be considered; this is the best way of ascertaining the intention of the Legislature. The words and meaning of one part of a statute frequently lead to a knowledge of the sense of another. (Bac. Ab. Statute I, 2.)

The 366th section of the code authorizes a Justice of the Supreme Court, at chambers, to enlarge the time within which any proceeding in an action must be had before judgment, except the time within which an appeal must be taken. In this provision we do not see any indication of an intention to limit a party to the iron rule of twenty days for putting in an answer or replication. It provides for an enlargement of the time whenever the exigency of the case, or convenience of the parties call for it. Relief after a failure to answer, which is excused, is as necessary and as proper as it is before the time for answering has expired. And it is very clear that if a suggestion had been made, that the power of the court, under the code, to grant this relief might be called in question, that this power would have been conferred in express terms. The provisions of the code in relation to amendments, rebuts the idea of an intention on the part of the Legislature to take from the court its thus acknowledged power to relieve a party from the consequences of a failure to answer within the time prescribed by the code. Chapter 6, of the code, enlarges greatly the powers of the court in granting amendments, and in disregarding errors and defects in the pleadings and proceedings in a suit. The most effectual provision is here made to relieve parties from the embarrassments of mistakes, defects and errors in the pleadings and proceedings. And it is manifestly a leading object of the whole code to secure the enforcement and protection of the substantial rights of the parties, and an adjudication in each particular suit, according to the very right of the case, without regard to the technicalities of either pleading or practice. To deprive the court of the power to allow a party to set up a valid defence, after a failure to answer, would contravene the general intent of the code, and would defeat one of the principal objects of its enactment.

It is a maxim of law, that an affirmative statute does not take away the common law. (Bac. Ab. Statute G.) So, if a statute in the affirmative gives a remedy (without a negative express or implied) for a matter actionable at common law, it does not take away the common law remedy. (5 Cow. 165.) In the Code of Procedure, there are no negative words, depriving the court of the power of giving relief in cases of a failure to answer within the twenty days. This power, at the adoption of the code, formed a part of the acknowledged jurisdiction of the court, which it derived from the common law. It being a highly beneficial, if not indispensable power in the administration of justice, it would seem that it could not be taken from the court, except by an express prohibition against its exercise.

In construing a statute, both the mischief and the remedy should be

considered. If a case is not within the mischief for which a remedy is provided, although within the letter, it will, by an equitable construction, be held not to be within the statute. (Bac. Ab. Statute I, 6.)

The exercise of the power to grant relief in cases of default, was not one of the mischiefs for which the code sought to provide a remedy. The denial of this power to the court should not, therefore, be held to be within the meaning of the code. It is also a rule of construction of statutes, that if a thing within the letter of a statute is contrary to the intention of the statute, it is not within the statute. (15 John. 358.) I am satisfied that the denial of the power in question is not within the intention of the code. If I am correct in this, it ought not to be held to be within the code.

It is very apparent to my mind, that if the Legislature had intended to take from the court the power of letting in a defendant to make a defence after failing to answer within twenty days, that the exercise of this power (then a part of the acknowledged jurisdiction of the court,) would have been expressly prohibited by the use of negative words.

In the 366th section of the code, where authority is conferred for enlarging the time within which a proceeding must be had, we find an express exception of the case of the time within which an appeal must be taken.

It is conceded that the court has no power to extend the time fixed by statute for bringing an appeal. Previous to the adoption of the code, this power was not possessed by the court. Its exercise was generally disclaimed, upon the ground that the time for appealing was fixed by statute, and not by a rule of the court. (5 Wend. 186; 10 Paige, 616.) But another reason may be assigned. In many of the provisions of the Revised Statutes, prescribing the time for bringing appeals and writs of error, &c., negative words are used. Thus, it is provided that all writs of error, &c., shall be brought within two years, &c., and not after. (2 R. S. 595, § 21, and 605, § 78, and see 259, §§ 191 and 195.) But the case of extending the time for bringing an appeal is not analogous to the case of relieving from the effect of defaults in not pleading or answering in time. The power of appealing is derived wholly from the statute. The power of the court to relieve against a default in the progress of a cause is derived from the common law.

Being perfectly satisfied that the Legislature did not intend to deprive this court of the necessary and indispensable power of relieving parties in proper cases from the unjust and ruinous consequences of a failure to answer within the time required by the code, I am of the opinion that a liberal and equitable construction of the code justifies the conclusion that

the code did not take from the court the right to exercise this power. I shall accordingly hold in this case, that this court has the power to let in the defendants to put in an answer to the plaintiff's complaint, provided they have made a proper case for the exercise of such power.

Only one of the defendants attempts to excuse his default, and his excuse is a lame one. He says he thought the time for answering expired on the 21st of January. He does not say that he informed his attorney when, according to his understanding, the time did expire. The other defendant makes no attempt to excuse his default. The plaintiff suggests that he will be in danger of losing his demand if the judgment is set aside, as the defendants are in doubtful circumstances, and he asks, if the defendants are let in, that it be upon the condition that they do not plead the statute of limitations. I am aware that the court has latterly, where the default is fully excused and merits are sworn to, refused to impose as a condition that the party should not plead the statute of limitations. (10 Wend. 595.) But here the default is not satisfactorily excused; at least not by one defendant, and the affidavit of merits is merely general. The defendants ought to have disclosed the nature of their defence, or have served a copy of their proposed answer duly verified, with their notice of motion, so that the court might judge whether they have a meritorious defence. (8 Howard's Pr. Rep. 350; 1 Bar. Sup. Ct. Rep. 81; 8 Paige, 135, 566; 10 Paige, 869.)

But to avoid the necessity of a renewal of this motion on papers obviating the objections to which the present papers are obnoxious, I have concluded to grant the motion on condition the defendants comply with the following terms, viz.: that they pay to the plaintiffs the costs and disbursements of the judgment and subsequent proceedings and ten dollars costs of resisting this motion; and that they do not set up in their answer the defence of the statute of limitations, and the judgment must stand as security.

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## SUPREME COURT.

WILLIAM H. PILLOW and ANN his wife vs. RICHARD BUSHNELL and others.

In an action for assault and battery on the wife, brought by the husband and wife of plaintiffs, the defendant cannot require the wife to testify as a witness, either under the act of 1847, or under § 344 of the Code of Procedure. The only disqualification designed to be removed by the statute, was that of being a party to the record. It was

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not intended to change the common law rule which declared the wife incompetent to testify as a witness either for or against her husband.

A person incompetent to testify from any cause, cannot be made a competent witness under the statute in question, by being made a party to the record. As a primary rule in the construction of statutes, the intention is to be collected from the words; but where the words are not explicit, it is to be gathered from the occasion and necessity for the law, the defect of the former law, and the designed remedy; being the cause which moved the Legislature to enact it.

In an action by husband and wife brought to recover damages for an injury to the person of the wife, the defendant is at liberty to prove that the act complained of was done by the consent and request of the wife, and if such facts are proved, they constitute an entire defence.

*January Term, 1849, before Justices HARRIS, WATSON and PARKER.*  
This was an action for assault and battery on the wife, tried at the Columbia Circuit, before Justice Cady, in October 1848.

The plaintiffs sometime after their marriage, had joined the society of Shakers at New Lebanon. The husband abandoned the society and afterwards, in August, 1847, went back to New Lebanon for the purpose of taking away his wife. She was unwilling to leave, and the assault and battery charged was that the defendants had rescued the wife from the husband, when he had her by the arm taking her out of the house. The defence was that, in what the defendants did, they acted by the consent and at the request of the wife.

After the plaintiffs rested, the defendants called Mrs. Ann Pillow, one of the plaintiffs, as a witness to prove the defence. The plaintiff's counsel objected, on the ground that she was called in hostility to the husband's claim, and contended that she was not a competent witness against the plaintiffs. The court overruled the objection and admitted the wife as a witness, and the plaintiff's counsel excepted. The judge among other things charged the jury that the wife was necessarily a party to the record—that the declaration alleged the assault and battery to have been committed on her and she was therefore the meritorious cause of action; and that if the jury were satisfied that no assault had been committed upon her or that what was done by the defendants was with her consent and concurrence and by her desire, they must find a verdict for the defendants; for if she, being the party assaulted, consented to the assault, if one was proved to have been committed, the action would not lie. The plaintiff's counsel excepted to that part of the charge which held that her consent constituted a defence—and the jury found a verdict for the defendants.

M. SANDFORD, *for plaintiffs.*

C. L. MONELL, *for defendants.*

By the Court. PARKER, Justice.—The first question to be considered is, whether the wife was a competent witness against the plaintiff.

At common law, husband and wife are excluded from giving evidence for or against each other. They cannot be witnesses *for* each other, because of the identity of interest; nor *against* each other on a principle of public policy, which deems it necessary to guard the security and confidence of private life, even at the risk of an occasional failure of justice. (1 Phill. Ev. 77; Cow. & Hill's Notes, 147, note 142; Greenleaf's Ev. §§ 334, 353.) Lord Coke says, "a wife cannot be produced against her husband, as it might be the means of implacable discord and dissension between them," (Co. Lit. 6, *b*.) and Starkie gives, as the reason for the rule that she is thus excluded for fear of creating distrust and sowing dissension between them and occasioning perjury. (2 Starkie's Ev. 706.)

Under this general rule it has been frequently held that when the husband is a party, the wife cannot be a witness either for or against him. (2 Haw. C. 46; 2 Hale, 279; 2 Str. 1095; *Fitch v. Hill*, 11 Mass. Rep. 286; *City Bank v. Bangs*, 3 Paige, 86.)

So inflexible is this rule that in a case where the defendant married one of plaintiff's witnesses after she was actually summoned to testify in the suit, she was held incompetent to give evidence. (*Pedley v. Nelherby*, 3 Car. & P. 558.)

The exceptions to this rule are very few and arise from the necessity of the case; as where the wife is admitted to prove violence to her person committed by the husband. (Greenleaf's Ev. § 343.)

So careful is the law to preserve inviolate the confidence between husband and wife, that even after the marriage has been dissolved by divorce *a vinculo matrimonii*, the wife, although she may be sworn, and is a competent witness as to some matters, is not permitted to disclose conversations, or facts that transpired during the coverture; (*Monroe v. Troistleton*; *Peakes ad. Cas.* 219; *Stute v. Phelps*, 2 Tyler's R. 374; *Radcliff v. Wales*, 1 Hill, 63;) and the same principle was applied where, after the death of the husband, the wife was called as a witness against the administrator. (*Babcock, Adm. v. Booth*, 2 Hill, 181.) It is certain that if the suit were brought by the husband alone, his wife could not be a witness either for or against him. But in this case the wife as a party plaintiff. The suit is brought for an injury to her person, and she was necessarily joined with her husband as plaintiff; and being a party, it is contended on the part of the defendants that she is made a competent witness by statute.

By the act of 1847, (Session Laws of 1847, page 630,) it is provided



that any party in any civil suit, &c., may require any adverse party, whether complainant, plaintiff, petitioner or defendant, or any one of said adverse party, to give testimony under oath in such suit or proceeding, in the same manner as persons not parties to such suit or proceedings, and who are competent witnesses therein.

An enactment substantially the same, though in different language, is found in § 344 of the Code of Procedure, which is as follows: "A party to an action may be examined as a witness at the instance of the adverse party, or of any one of several adverse parties, and for that purpose may be compelled in the same manner and subject to the same rules of examination as any other witnesses, to testify either at the trial, or conditionally, or upon commission." This section is made applicable to suits pending at the time the Code of Procedure took effect, and this suit belongs to that class.

The language of the act of 1847, if literally construed and without reference to other guides which we are to consult in giving a construction to statutes, might admit of the application claimed by the defendants; "any adverse party," is an expression broad enough to include every individual made a party, no matter what may be his relation to another party. But statutes must be expounded according to the meaning and not according to the letter. (1 Kent's Com. 462; Dwarries on Stat. 552, 557; Smith's Com. on Stat. §§ 480, 515, 550; Gilman's Dig. 187, § 5, *qui hæret in litera, hæret in lortice*.) The letter of the law is the body; the sense and reason of the law is the soul. (*Eysler v. Studo*, Plowden, 465; 2 Just. 107.) It is true, it is a primary rule that the intention is to be collected from the words; but when the words are not explicit, it is to be gathered from the occasion and necessity of the law, the defect of the former law and the designed remedy being the causes which moved the Legislature to enact it, (Dwar. on Stat. 562,) and the same author says, "it is not to be presumed that the Legislature intended to make an innovation upon the common law further than the case absolutely required. The law rather infers that the act did *not* intend to make any alteration other than what is specified and besides what has been plainly pronounced; for if the Parliament had had that design, it is naturally said they would have expressed it. (Dwar. on Stat. 564; Smith's Com. on Stat. § 530.) I think it is clear that the object of this statute was simply to remove the technical objection that previously existed under which a person could not be compelled to testify, because he was a party to the record, (1 Phil. Ev. 72; Green. Ev. § 353,) and that the only disqualification intended to be removed was that which arose from

the fact of being a party to the record. It can no longer be objected by the witness that he is a party to the suit—but if there be any other disqualification, it is not removed by the statute.

I am unwilling to suppose it was the intention of the Legislature to destroy by implication, and without any enactment clearly expressing such design, the ancient, well-settled and most salutary rule of law, which precluded both husband and wife from being witnesses against each other. The reasons, which for centuries have sustained this rule of evidence against infringement are no less cogent now than formerly. At no former period has it been more emphatically the dictate of sound public policy to preserve sacredness of a marriage relation, by protecting its confidence and guarding against discord and dissension. The act of 1847 is not expressly repealed by the code, but if there is any substantial difference in the language of the two acts, the latter would seem to give a legislative construction to the former, if indeed it does not virtually supersede it. I do not, however, think it material to decide this point, having come to the conclusion that the true construction of this new provision, even upon the language used in the act of 1847, does not render the wife a competent witness. An analogous construction was given to the Statute of Gloucester, c. 5. In regard to it, it is said in 2 Coke's Just. 300, "Though the assignee of tenant by courtesy or dower is within the letter of that statute, for he holdeth in some manner for life;—and the words are *on en anter maner a terme de vie*; yet no action of waste shall be brought by the heir against the assignee, but only against the tenant by courtesy or dower, these being the sole persons against whom it lay at the common law.

If the statute is to be construed as making every party a competent witness on the call of the adverse party, then it would remove the disqualification of several classes of persons now incompetent, such as insane persons, idiots, children who do not understand the moral obligation of an oath, and others. This could never have been intended. It is not claimed that the wife could have been called against her husband in a suit brought in his name alone; can it be that making her a party renders her competent? If so, then a witness is qualified to testify by the fact of being made a party to the suit. A wife not a party is incompetent, but a wife who is a party, and thus has what was formerly an additional disqualification, is a competent witness, though the same reasons for excluding her as a witness are equally applicable in both cases.

On the whole, I am well satisfied the learned justice erred in receiving the wife as a witness.

As to the other question presented, I am equally well satisfied that the charge was correct. If the act complained of as an assault and battery, was committed by the consent and request of the wife, it formed an entire defence.

But the ruling at the circuit having been erroneous on the first point, there must be a new trial, costs to abide the event.

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MICHAEL P. MERRITT vs. ROGER D. WING, RUSSELL C. WHEELER,  
TIMOTHY B. WHEELER and ALEXANDER K. WHEELER.

In all suits pending when the code took effect, the time of issuing executions therein must be governed by the laws then in force.

An execution issued within thirty days from the entry of a judgment obtained in January last, in a suit commenced prior to July 1, 1848, *held* to be irregular.

Such irregularity is waived, if the defendant *consents* to the issuing of the execution.

*Special Term, Washington County, February, 1849.*—Motion to set aside execution. The judgment in this suit was perfected against the defendants, Wing, R. C. Wheeler and T. B. Wheeler, on the 17th January, 1849; and an execution was issued thereon on the 22d of January, 1849. The suit was commenced in the spring of 1847. No process was served on A. K. Wheeler. After the execution was issued, and on the 24th of January, the sheriff called on the defendant, R. C. Wheeler, and showed him the execution. R. C. Wheeler said that neither he nor T. B. Wheeler had any property, and that he was perfectly willing that the plaintiff should issue his execution and make what he could on it. On the same day the sheriff and the plaintiff's attorney called on the defendant, Wing, who, after some hesitation, and after some conversation with the sheriff and plaintiff's attorney, consented that the sheriff should make a levy on his personal property, if the levy could be kept still, and he protected in retaining the property exempt by law from execution. And the sheriff then made a levy, the defendant, Wing, pointing out to him his property. Wing stood by and saw the sheriff make his inventory of the property levied upon without objection. The execution was issued in the old form in use before the adoption of the code.

J. C. HOPKINS, *for defendants.*

JAS. FINLAYSON, *for plaintiff.*

PAIGE, Justice.—This suit was commenced before the Code of Procedure took effect. By the act of 14th May, 1840, (sec. 24,) an execu-

tion could not be issued until after the expiration of thirty days from the entry of the judgment. The 54th section of the Judiciary Act (May 12, 1847,) did not repeal this section of the act of 1840. The 8th section of the code expressly confines its provisions to civil actions, commenced after the time when the code was to take effect. And the supplement to the code does not make the 238th section of the code in relation to executions and the time of issuing the same, applicable to suits pending when the code went into operation. This statement shows that in all suits pending when the code took effect, the time of issuing executions must be governed by the laws then in force. This being the case, the execution in this suit having been issued before the expiration of thirty days from the entry of the judgment, was irregular. But as to the defendants, R. C. Wheeler and Roger D. Wing, the irregularity was waived by the consent of Wheeler that the execution should be issued, and by the consent of Wing, to the sheriff's levy on his personal property. (*Kimball v. Munger*, 2 Hill, 364; 1 Howard's Sp. Term Rep. 71; 2 Hill, 378, Anon.) There has been as yet no attempt to enforce the execution against the defendant T. B. Wheeler. When such attempt is made, he will be at liberty to apply to have the execution set aside as to him. The motion must be denied, but without costs.

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WASHBURN vs. HERRICK.

In cases where service by mail may be made, double time (forty days) is allowed to serve an amended answer or reply, of course, and without costs.

*Special Term, Washington County, February, 1849.*

J. LEWIS, *for plaintiff.*

E. F. BULLARD, *for defendant.*

PAIGE, Justice.—Where a defendant serves his answer to the complaint by mail, in cases where service by mail may be made, he has forty days within which to serve an amended answer of course, and without costs, under § 148 of the code. The defendant may amend of course and without costs, &c., at any time before the period of replying to his answer shall expire. Where the service of the answer is by mail, the plaintiff has double the time to reply allowed in cases of personal service of the answer. (Code, sec. 373 and 131.)

If the plaintiff notices his cause for trial before the time allowed to the defendant to amend shall have expired, he does so at his peril.

THOMAS NEELE vs. ANDREW BERRYHILL.

MYRON H. CLARK and WILLIAM GORHAM vs. ANDREW BERRYHILL.

HENRIETTA S. GIBBS vs. ANDREW BERRYHILL.

The court will not allow a *party* to suffer by the omissions or mistakes of a clerk, attorney, or other officer of the court, where a substantial right is involved.

Thus, two written statements duly verified, were filed by an attorney with the clerk of the county, for the purpose of having judgments entered by confession (against the same defendant) without action, pursuant to chap. 3, of title 12, of part 2, of the Code of Procedure. And the clerk entered in the judgment book, judgments of the Supreme Court for the respective amounts confessed, with costs; but omitted to endorse the same upon the statements as directed by § 337. On a subsequent day another written statement against the same defendant, by a different attorney, was filed with the same clerk, and judgment by confession thereon was perfected regularly in all respects, pursuant to the code aforesaid—the last mentioned attorney knowing of the omissions in the two first causes. On a day subsequent to the entry of this last judgment, the attorney in the two first causes consented that the clerk *re-enter* the two first named judgments by making the proper endorsements &c.; to perfect the same regularly—which was done—making them subsequent in entry and lien to the judgment first regularly entered.

On a motion in behalf of the plaintiffs in the two causes first mentioned for an order requiring the clerk to endorse on the statements as of the time they were *originally filed* and that the judgments be entered in the judgment book and docketed as of the same day; the order was granted, and the *re-entry* vacated.

*Ontario Special Term, February, 1849.—Before WELLES, Justice.* On the 4th day of December, 1848, a written statement, duly verified, was filed with the clerk of Ontario county, for the purpose of having a judgment entered by confession, without action in the first above entitled cause, for the sum of \$204.25, pursuant to ch. 3, of title 12 of part 2, of the Code of Procedure. Upon receiving and filing the statement, the clerk entered in the judgment book a judgment of the Supreme Court for the amount confessed, with \$5.00 costs; but omitted to endorse the same upon the statement as directed by § 337. On the 12th day of December, 1848, a similar statement was filed with the same clerk in the second cause, for judgment without action for the sum of \$280.38, duly verified in pursuance of said chapter, upon which the clerk entered judgment in the judgment book for the amount confessed, and \$5.00 costs, and omitted, as in the first case, to endorse the judgment on the statement.

On the 20th day of January, 1849, a judgment by confession was entered in the third cause, for the sum of \$389.28, and 5.00 costs, which

was in all respects regular, and in conformity with the said Code of Procedure—all the said judgments were docketed at the times of filing the statements respectively.

On the 26th January, 1849, upon having his attention directed to the said 337th section of the code, and his omissions to endorse the judgments on the statements in the first two causes, the clerk made the endorsements on the statements in those causes as required by said section, refiled the statements as of that day, and entered and docketed the judgments in the judgment book and docket kept in his office.

At the time the statement in the third cause was filed and the judgment perfected thereon, which was on the 20th day of January, the attorney for the plaintiff knew of the omissions of the clerk to make the proper endorsements on the statements in the first and second causes. The clerk, in his affidavits, states that upon having his attention called to the omissions to make the proper endorsements upon the statements on the 26th of January he believed he could not at that time endorse judgments on the statements, which would support the judgments previously entered in the judgment book and docketed in the same causes, and, therefore, concluded to enter, and did enter and docket the judgments on the said 26th day of January, after having endorsed the same on the statements as required by the law; and that said judgments were so entered up a second time by him, in order to prevent loss to the plaintiffs by the recovery and docketing of any other judgments against the said Berryhill, which might become prior liens to the judgments in the said first and second causes. It also appears by the clerk's affidavit, that at the time the judgments were endorsed by him on the statements in the first and second causes, (26th January, 1849,) there was no other judgment against the said Berryhill, docketed in his office, since the said 4th day of December, 1848, excepting as above stated. The attorney for the plaintiff in the third cause states in his affidavit, that on the 26th day of January, 1849, he informed the attorney for the plaintiffs in the first two causes, that no judgment had been endorsed on the statements, and that on the 27th of the same month the attorney informed him that he had on the day previous thereto, directed the clerk to make the endorsements and docket the judgments, as of the 26th day of January aforesaid; and that the endorsements are in the handwriting of the said attorney.

Upon these facts and allegations, a motion was made in behalf of the plaintiffs in the first and second causes, for an order requiring the clerk of Ontario county to endorse on the statements, judgments in the Supreme Court, as of the times they were originally filed respectively, and that

such judgments be entered in the judgment book and docketed as of the same dates respectively.

J. WILSON and GEO. WILSON, 2d, for *plff's* in 1st and 2d causes.

M. H. SIBLEY and H. METCALF, for *plff's* in 3d cause.

E. G. LAPHAM, for *defendant*.

WELLES, Justice.—If it were not for the fact that the plaintiff's attorney in the first two causes directed the entry of the second judgments in those causes, on the 26th of January, I should have no difficulty in disposing of this application. The plaintiff's attorney had done all in his power, and all the law required of him, when he left the statements with the clerk to be filed. It was then the duty of the clerk to endorse upon them, and enter in the judgment book, judgments of the Supreme Court for the amount confessed, with five dollars costs in each case. The statements and affidavits, with the judgments endorsed, would have thereupon become the judgment rolls, (§ 887 of the code) and if the clerk for any reason, not connected with the plaintiffs, as implying their direction or consent, had omitted any part of his duty, the court on application made in a reasonable time, would direct the thing done, which had been thus omitted by the clerk, as of the time it should have been done. It is a settled principle with the court, that its suitors shall not be prejudiced by the mistakes or misprisions of its officers; and amendments in such cases, are generally matters of course. (*Close v. Gillispie*, 3 J. R. 526; *Seaman and others v. Drake*, 1 C. R. 9; *Chichester and others v. Cande*, 3 Cow. R. 89.) The case *ex rel. Buller and others v. Lew. Com. Pleas*, (10 W. R. 541) is supposed to be an authority against the motion. In that case, the judgment record had been signed by a judge of the County Courts, not the first judge nor of the decree of counsellor of the Supreme Court, and in a case where the statute required it to be signed by either the clerk, the first judge or some other judge being of the degree of counsellor, &c.

On a motion in the Common Pleas to set it aside, for that defect, the court allowed the plaintiff leave to have the record properly signed and filed *nunc pro tunc*. The Supreme Court granted a mandamus, commanding the judges of the Common Pleas to vacate the rule made by them, and to set aside the judgment so far as the relators were concerned, who were junior judgment creditors. Nelson, Justice, who gave the opinion, recognizes the rule I have stated, and refers to the authorities I have cited without disapprobation; but distinguishes the case from those, on the ground that the judge who signed the record, acted without authority and

beyond his jurisdiction. On that subject he says, "the case does not fall within the rule, that the court will not permit a party to suffer by the errors of its officer. So far as the act of signing was concerned, the judge was not an officer of the court, he having no more right to perform it than any other individual." The decision was put mainly on the provision of the Revised Statutes, (2 R. S. 360, § 11,) which declares that no judgment shall be deemed valid so as to authorize any proceedings thereon, until the record thereof shall be signed and filed; and § 12, which declares that no judgment shall effect any lands, &c. or have any preference as against other judgment creditors, &c. until the record thereof be filed and docketed, &c. He regarded the record in that case of no more validity than if the attorney had filed it, when it came from the hand of his clerk, and as a mere blank piece of paper, so far as the judgment was concerned. The case is therefore plainly distinguishable from the present. If the error in that case had been committed by the clerk so as to bring it within the rule referred to, I think it clearly inferable that the decision would have been the other way.

But it is urged, among other things, that by the second or re-entry of the judgments in the first two causes, on the 26th of January, and *that* by the direction of the attorney for the plaintiffs, whatever rights may have existed prior to that time to have the omissions of the clerk supplied, were by that act waived, and that by re-filing the statements and perfecting regular judgments on that day, the power of the clerk, and the authority of the statements were exhausted; and that the judgments were good and valid in all respects as of the day last mentioned, and it is denied that the court has now any power to grant the relief asked for.

There is certainly plausibility in these positions; and yet, I do not think they form an insurmountable obstacle to the interposition of the equitable power of the court in the premises. Suppose the clerk, as is fairly to be intended from his affidavits, entered the second judgments on the 26th of January upon his own suggestion and without the knowledge or consent of the plaintiff's attorney; I do not see but in that case his authority and the force of the statements, would be expended as much as if he had done it by direction of the attorney. It would then, as much as in any other case, have been a mistake of the officer of the court. A party should not be permitted to suffer by the act of the clerk in mutilating records or papers in his office any more than by his omission to perform a plain duty.

It is furthermore said, that when the attorney discovered the omissions on the 26th of January, he had an election to apply to the court for the



relief to which it might then have been entitled, or to take new judgments as of that time ; and having chosen the latter course he has determined his election, and is bound by it. In the first place, the clerk represents it to have been his own act, and done upon his own suggestion. The proof to the contrary is circumstantial, consisting of the fact that the endorsements upon the statements are in the handwriting of the attorney, and his admissions and declarations sworn to in the affidavits read in opposition to the motion, to which no contradiction or explanation could be offered. Such declarations and admissions made by the attorney would not be received in evidence against a party, upon the trial of an issue, because it would be hearsay evidence, and the attorney would be a competent witness to the fact alleged to have been admitted by him. And the rule should be the same on a motion in regard to opposing affidavits, which the moving party has no opportunity of answering, especially since the Legislature has provided a way to obtain the evidence, (2 R. S. 554 1st ed. § 24.)

The handwriting of the attorney, alone, proves nothing, as it was competent for the clerk to request or employ him or any one else to make the endorsements, and it will be deemed as having been done by the clerk. In the present case, they were subscribed by the clerk himself. In the next place, if the act was done by the express direction of the attorney, it was not, in my judgment, such a determination of an election as to conclude the party. The rule which I have mentioned and repeatedly referred to, extends to the mistakes and omissions of attorneys, as officers of the court. This is expressly held in the case of *Close v. Gillispie*, already cited. Spencer, Justice, in that case says : " I cannot discover any difference, as to the allowing of an amendment, whether the mistake has happened through the omission of an attorney, or by that of a clerk. Both are equally officers of the court." Such is the rule in the English courts. (4 Burr, 2449.) I think, if an attorney has power, by virtue of his general retainer, to determine an election for his client, in a case where a substantial right is involved, (as to which there may be doubt,) that this should not be deemed such determination, but rather a mistake arising under a new system of practice, with which the courts as well as the legal professions are as yet but little acquainted.

And, finally, I think the 149th section of the Code of Procedure has made provision which fully covers this case. That section reads as follows : " The court may, at any time, in furtherance of justice, and on such terms as may be proper, amend any pleading or proceeding, by adding or striking out the name of any party, or (*may amend*) a mistake in

any other respect, or by inserting other allegations material to the case, or by conforming the pleading or proceeding to the facts proved, whenever the amendment shall not change substantially the cause of action or defence." The words, in a parenthesis, "*may amend*," are not in the section, but must be understood, in order to make sense of that part of the section. This section invests the court with very enlarged powers of amendment; and it is well that it does so, as otherwise the code itself, owing to its numerous, new, and complicated provisions, would have amounted, in many instances, for a considerable time to come, to nearly a denial of justice.

The only remaining question is, will the amendment or relief asked for be in furtherance of justice? Of this I have no doubt. To deny it would be unjust. It would be leaving a party to suffer by the neglect of the officers of the court. No injustice will be done by granting it, as the judgment in the last cause was perfected with knowledge of the rights of the plaintiffs in the other two, and no judgments in favor of other persons have been entered against the defendant in the meantime, or since the plaintiffs in those causes were entitled to have their judgments perfected.

The plaintiffs in the first and second causes are entitled to have the statements filed, and judgments regularly perfected thereon, according to ch. 3, of title 12, of part 2 of the code, as of the times they were originally filed with the clerk, (the 4th and 12th December, 1848,) and to have the judgments entered on the statements on the 26th of January, 1849, together with the filing of the statements and docketing the judgments on that day, vacated—a rule or rules may be entered accordingly—no costs of motion are allowed to either party as against the other.

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## SUPREME COURT.

### JAMES BRAGG and others vs. JAMES BICKFORD and others.

The court has power under the 149th section of the code (original) to allow a complaint to be *verified by oath*, (after it has been served) upon motion—showing good excuse for the omission.

*Monroe Special Term, October, 1848.* Motion to set aside summons and complaint.

The summons and complaint were served on the defendants on or about the 11th August last. The complaint was not verified as required

by the 133d section of the Code of Procedure, and for that reason the defendants move that it be set aside, &c. The plaintiff now moves to amend by verifying the complaint.

H. K. JEROME, *for defendants.*

C. TUCKER, *for plaintiffs.*

WELLES, Justice.—It is objected by the defendants' counsel, that to allow the complaint to be now verified, would be going beyond any provision of the code. That the verification is a statute requirement, and the complaint is a nullity without it, and that the court has no power to allow the defect to be supplied. In the case of *Swift and another v. Hosmer and another*, 3 Howard's Sp. T. Rep. 284, the defendant put in an answer not verified by oath, which the plaintiff disregarded and signed judgment. On a motion to set it aside, Justice Gridley held the judgment regular and denied the motion. The report of the case does not show that any application was made to amend, by adding the verification. The principal question discussed by the court in that case was, as to the manner the pleading should be verified, whether *by oath*, or in some other way, and he comes to the conclusion that although the section of the code is silent as to what kind of verification is to be used, yet that the plain and obvious meaning of the section is, that it must be verified *by oath*, and concludes as follows: "The answer, in this case, not being verified by oath, in analogy to the case of pleas in abatement, may be treated as a nullity." In this case, the plaintiffs excuse the omission; and if the court has the power to allow the amendment, I think it ought to be done. An omission of the verification of a plea in abatement would probably not be allowed to be supplied after the expiration of the time for putting in the plea, for the reason that such pleas do not relate to the merits, and are not favored by the court.

The 149th section of the code provides that the court may, at any time, in furtherance of justice, &c., *amend any pleading or proceeding*, by adding or striking out the name of any party, or *a mistake in any other respect*, &c. I think it quite evident that the Legislature intended to allow great latitude in the way of amendments, and indeed, to confer upon the court almost unlimited power in this respect, where the furtherance of justice should require it; and, as this seems to me to be a case of that character, I shall give the plaintiffs leave to amend their complaint by verifying the same. The motion on the part of the defendants is therefore granted, unless the complaint shall be verified, as required by the code, within ten days—the defendants to have twenty days to answer the same

from the time of such verification, unless it has been verified since notice of this motion was given, in which case the defendant is to have twenty days from the service of a copy of this order, to answer, &c.

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## SUPREME COURT.

## FRANCIS BUZARD VS. GEORGE GROSS.

Where a motion is made by the defendant for a new trial, upon a case made after judgment entered, which was denied with costs to be paid by the defendant, (in November, 1848.) And on a motion by plaintiff for an attachment for the non-payment of such costs, *held*, that under the 2d section of the act, chap. 390, Laws of 1847, 491, the defendant could not be imprisoned. That process in the nature of a *fi. fa.*, as directed by said act, was the proper remedy.

*Erie Special Term, December, 1848.* This suit was commenced in the late Court of Common Pleas of Erie County, against the defendant for mal-practice as a physician and surgeon. The action was tried in the Common Pleas and a verdict rendered for plaintiff of \$1000, upon which judgment was perfected in the Common Pleas, a case was made before the 1st July, 1847, and after that date a motion made thereon for a new trial in the Supreme Court, which motion was denied in November, 1848, with costs to be paid by the defendant. The costs of the plaintiff on the motion for a new trial were duly taxed on the 5th day of December, 1848, at \$32.12.

A motion is now made that the defendant pay those costs or be attached, or for such other relief as the court may grant, &c.

P. HOFFMAN, *for plaintiff.*

W. W. PEACOCK, *for defendant.*

WELLES, Justice.—By the 2d section of the act, ch. 390, Laws of 1847, p. 491, it is provided that no person shall be imprisoned for the non-payment of interlocutory costs, or for contempt of court in not paying costs, except attorneys, solicitors and counsellors and officers of court, when ordered to pay costs for misconduct as such, and witnesses when ordered to pay costs on attachment for non-attendance.

The second section of the act supplies the remedy by process in the nature of a *feri facias* against personal property, for the collection of costs, in the cases where the remedy by attachment had been taken away by the second section.

The section recited forbids imprisonment for the non-payment of "interlocutory costs," or for contempt of court in not paying costs, except in certain specified cases of which this is not one.

I do not think the present is a case of interlocutory costs. If judgment had not been perfected before the motion for a new trial these costs would have gone in with the general costs of the plaintiff, and formed a part of his judgment in the cause—and inasmuch as the order denying the new trial directs them to be paid by the defendant, his refusal to pay them would be contempt of court, for which under the former law and practice he would be liable to attachment. (3 Hill, 452.)

This statute, however, goes farther, and abolishes imprisonment not only for interlocutory costs, but "*for contempt of court in not paying costs.*" This provision is general in its items, and I think embraces this case. An order may therefore be entered requiring the defendant to pay this bill on being served with the rule of the court directing its payment, and with the taxed bill, accompanied with a demand of payment, or that process issue in the nature of a *fi. fa.* for their collection.

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### SUPREME COURT.

ALVIN O. WOODWORTH vs. JAMES BELLOWES, WILLIAM A. SACKETT,  
ABEL DOWNS and CARLTON W. SEELYE.

Where the answer of one of several defendants, states facts which do not constitute a defence and is immaterial as between him and the plaintiff; but is intended to form a case for adjudication of equities between him and a co-defendant, that the court may allow him to be subrogated in the place of the plaintiff in pursuance of section 230 of the code, (original)—none of the other defendants answering. The answer on motion will be stricken out, for the reason, that it is entirely immaterial on the question of the plaintiff's right to recover.

The facts stated in the complaint are to be taken as true by the defendant, who does not answer, and he is not to be deemed as admitting anything contained in the answer of his co-defendant, in which he has not participated.

If the answer stood before the court as proved, or admitted by the co-defendant, *it seems*, that it would form a case for the relief sought under the section of the code mentioned.

*Ontario Circuit and Special Term, February, 1849.* The complaint is upon a promissory note made by defendant Bellows to the defendant Sackett or order, and endorsed by Sackett and the defendants Downs and Seelye.

None of the defendants have answered excepting Bellows, whose answer states that he and Sackett and others, joined in the purchase of a press, types, &c., constituting a newspaper establishment, (The Seneca County Courier) for the price of \$1700, divided into shares, and that Bellows took one share and gave the note in question to Sackett for that share; that afterwards Sackett sold the entire establishment and received the avails of such sale, the share of which belonging to Bellows, together with his share of donations made by different individuals for the purchase of the press, &c., in his (Sackett's) hands, amount to sufficient to pay the note in question, and claims that Sackett should be charged with the payment of the note, and prays that if any judgment be rendered, it may be that Sackett pay the note, or if collected of Bellows, that he may be subrogated in the place of the plaintiff to collect the amount of Sackett. A motion is made to strike out the answer, and for judgment for plaintiff.

J. T. MILLER, *for plaintiff.*

FOOTE & BELLOWES, *for defendant Bellows.*

WELLES, Justice.—The facts stated in the answer clearly do not amount to a defence as against the plaintiff. They make no issue between the parties to the suit, and the answer states no facts that the plaintiff can safely or is bound to deny. The whole answer is entirely immaterial on the question of the plaintiff's right to recover. Its object was to lay the foundation for an order or judgment by which the equities shall be adjusted and enforced as between the defendant Bellows and his co-defendant, Sackett. And the court is called upon to adjudicate such equities upon the facts so stated in the answer in pursuance of the 230th section of the Code of Procedure.

This cannot be done in the present state of the case. Sackett, against whom Bellows asks the relief, has omitted to answer. The consequence is, so far as he is concerned, that the facts stated in the complaint are to be taken as true and nothing further. He is not to be deemed as admitting anything set up by his co-defendant, in an answer in which he does not participate. The matters stated in the answer are not proved, and the legal effect of those contained in the complaint is directly the reverse of those in the answer. The complaint shows that Bellows was the maker of the note, and Sackett the payee and first endorser—under such a state of facts, if Sackett should pay the judgment, equity would allow him to be subrogated in the place of the plaintiff in order to avail himself of the judgment against Bellows, the original and principal debtor.

If the answer of Bellows stood before the court as proved or admitted

by Sackett, it might and probably would form a case where the relief which the section of the code referred to, seems to contemplate, would be given to Bellows.

The motion to strike out the answer and for judgment in favor of the plaintiff against all the defendants for the amount claimed in the complaint is granted, but the defendant Bellows may amend his answer on payment of \$5 costs, the amended answer to be served in twenty days, &c.

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### COURT OF APPEALS, MAY TERM, 1849.

GILBERT A. WILKIN and another, Appellant, agt. NATHANIEL PEARCE,  
Respondent.

An attorney should not wait until the last day but one for filing notices of argument or issue, before sending to the clerk to file for the calendar. If he does thus wait, without a sufficient excuse, and circumstances then transpire which prevents his sending his notice in season for the calendar he will not be allowed to put it on, whatever his excuse may be after that time.

WM. CURTIS NOYES, *for respondent*, moved to put this cause on the (present) calendar upon the following affidavit: (Title of the cause.) "City and County of New York, ss: Joseph S. York, attorney for the respondent in the above cause, being duly sworn, says; that this cause has been regularly noticed on both sides for the present May term of this court, and has been on the calendar for the three last terms of this court. That the day previous to the last on which notes of issue could be filed for the present term, this deponent was suddenly and violently taken sick, so as to unfit him from attending to any professional business, or be able to give his attention thereto, and was thus sick for three days. That this deponent fully and honestly intended to put this cause on the calendar, and would have done so had it not been for his illness. That on his recovery, deponent applied to the clerk of the court to put the cause on the calendar, stating the circumstances of his illness, as the excuse for not filing his note of issue in season; but the clerk declined on the ground that the calendar was in the hands of the printer. That, as deponent believes, both sides are ready for the argument of this cause.

"Sworn to &c."

(Signed.)

THE COURT denied the application on the ground, that the attorney should not have waited until the last day but one before sending his notice of argument (or issue) to the clerk for filing.

## COURT OF APPEALS, MAY TERM, 1849.

JAMES RICE, Plaintiff in Error, vs. EDWARD FLOYD, Defendant in Error.

The *verdict of a jury*, upon a question of fact, upon the trial of which there is a question as to the credibility of the witnesses by which it is sought to be proved, is a final determination of the case. A court will not interfere with such decision.

This was an action of *trespass*, commenced before a justice of the peace. Floyd sued Rice for taking and selling a set of harness. The plaintiff proved his case by two witnesses, and the defendant gave evidence tending to show that the general character of the plaintiff's witnesses was bad, and that they were not to be believed under oath. The plaintiff then introduced several witnesses to sustain the general character of those by whom he proved his case, and the jury found a verdict in favor of the defendant. The plaintiff sued out a certiorari to the County Court, and that court *reversed* the judgment of the justice on the ground that the verdict of the jury was contrary to the weight of evidence. The defendant brought a writ of error to the Supreme Court, where the decision of the County Court was *affirmed*. That court *held*, that it was a question of fact, whether the harness belonged to the plaintiff, Floyd, or to Thomas Biggs, the defendant, in the execution under which it was taken and sold. That the testimony as to Floyd's ownership, was all on one side. That there was no contradictory evidence, except a feeble attempt to impeach the credibility of the plaintiff's two material witnesses. That this attempt was met and successfully overthrown by a still greater number of witnesses, sustaining their characters. That the verdict was not only against the weight of evidence, but was without evidence to support it. That it was therefore a case in which the County Court was authorized to *reverse* the judgment below. (13 Wend. 76.)

The defendant, Rice, brought a writ of error to this court.

N. HILL, Jr., for plaintiff in error.

J. E. BURRILL, Jr., for defendant in error.

THE COURT, upon the argument, *reversed* the judgment of the Supreme Court, and County Court, and *affirmed* that of the justice, upon the ground that it being a question of fact, and a question as to the credibility of the witnesses by which that fact was sought to be established, made it a proper case for the decision and final determination by the jury.



## JAMES WHIPPLE vs. DANIEL C. WILLIAMS.

A motion may be noticed for a day in term (special) other than the *first*, if a sufficient excuse appear upon the moving papers.

The acts of a clerk in adjusting and settling the amount of costs, under § 11 of the code, (not being a regular and orderly taxation as under the former law) are not necessarily final and conclusive, because no *review* is expressly given in the act. The court has, as one of its incidental powers, the right to control the legal acts, and compel a performance of legal duty of all its inferior officers. And the exercise of this power is peculiarly necessary in the formal and proper entry of the judgment.

Where a party is entitled to the costs of a circuit, (for attendance, &c.) he should move the first opportunity after the circuit adjourns. (5 Wend. 82; 1 Howard's Pr. R. 105; 2 Wend. 288; 7 Wend. 519.)

Where only the plaintiff notices the cause for trial, and has it in his power to try, but for any reason does not choose to do so, he cannot recover the costs of the circuit.

Service of notice on Saturday for Monday (intending to be a two days' notice) to settle and adjust costs, before the clerk, *held* to be insufficient. There should be two full *business* days. *It seems*, that *Sunday* intervening should be excluded in the computation of the time for service, where the time is *less* than one week.

Costs of the motion will not be allowed, where the notice of motion asks for more than the party is entitled to.

*Oneida Special Term, June, 1849.* This was an action of slander commenced under the code, and was noticed for trial by the plaintiff, at the circuit held in Otsego in December, 1848, but was not noticed on the part of the defendant. The defendant attended prepared for trial, but the cause was not moved by the plaintiff. The plaintiff again noticed the cause for trial in January, but countermanded his notice before the commencement of the circuit, and the defendant did not notice the cause. The cause was tried at the March circuit, and a verdict rendered for the plaintiff. The attorneys of both parties reside in New Berlin, Chenango county. Between eight and nine o'clock in the evening of Saturday, the 31st day of March, the plaintiff's attorney served upon the defendant's attorney, by leaving at his office a copy of costs in the cause, with notice that the same would be settled and adjusted by the clerk of Otsego county, Cooperstown, some thirty or forty miles distant, on Monday, at nine o'clock, A. M. The costs were adjusted by the clerk at the time mentioned in the notice, and the amount inserted in the record; and among other items the plaintiff was allowed \$1.50 for serving the complaint, the same not having been served by a sheriff; and \$22.82 for the attendance of witnesses at the December circuit. The defendant now moves to set aside the taxation and settlement of the costs, and for a reference to the clerk for a re-settlement, and also to be allowed his costs for attending prepared for trial in December, and for preparing for trial for the January circuit.

A. BENNETT, *counsel for the defendant.*

H. T. UTLEY, *counsel for plaintiff.*

ALLEN, Justice.—The plaintiff objects:

*First.* That the motion should have been noticed for the first day of the term. (Rule 56.) The excuse of the defendant's attorney for not having done so appears upon the moving papers, and I think is sufficient. The motion was noticed in proper time for a special term in Broome county, and was not made on account of the final adjournment of the court unexpectedly, and at an earlier day than was anticipated, and the motion was then noticed for as early a day in this term as was practicable.

*Secondly.* It is insisted that the court has no authority to review the acts of the clerk, and correct his errors in the settlement of the costs; that the duty of adjusting and settling the amount of the costs is devolved upon the clerk by § 311 of the Code of Procedure, (original code § 266,) and that his acts are final. This objection is not tenable. The code does not assume to provide for a regular and orderly *taxation* of the costs as was practiced under the former system. It was supposed that that part of the code regulating the costs to be allowed to the prevailing party would execute itself, and that the insertion of the amount as fixed by the law would be but little more than a clerical act.

It is true, nevertheless, that the clerk necessarily adjudicates and passes upon the several items of the costs and disbursements; but it by no means follows that such an adjudication is final, because no review is expressly given by the act.

It is the duty, as it is doubtless one of the necessary and incidental powers of the court, to see to the proper and legal discharge by its inferior officers of their duties. The clerk, as one of the officers of the court, is in all things, and in none more so than in the formal entry of the judgment which is pronounced by the court, under the direction of the court. The court has, as one of its incidental powers, the same right to control his actions and compel him properly to perform his duties, that it has to regulate its practice, govern and control the attorneys, and finally to adjudicate upon and settle the rights of the suitors. This power cannot be taken from the court, except by express legislation.

The defendant is not at this time entitled to have an order upon the plaintiff for the payment of his costs of the December and January circuits. If the plaintiff, upon a reasonable application, would have been liable to pay them, and I have but little doubt of his liability to pay the costs of the December circuit, (18 Wend. Rep. 519,) the motion should have been made the first opportunity after the adjournment of the

circuit. (5 W. R. 82; *Innes v. Van Epps*, 1 How. Pr. Rep. 105; 2 W. R. 288; 7 W. R. 519.) The defendant must be held to have waived his right to the costs of the circuits at which the cause was not tried. But the plaintiff was clearly not entitled to the fees for the attendance of his witnesses at those circuits. He had called the defendant there upon his notice, and had it in his power to try the cause, and if for any reason he did not choose to do so, the defendant cannot be charged with the costs of the circuit. (*Titus v. Bullen*, 6 W. R. 562; *Leaven v. Lush*, 3 W. R. 305; *Slocum v. Lansing*, 3 Denio, 259; *Willard v. Harbeck*, id. 260; *Purdy v. Morgan*, 2 How. Pr. Rep. 149.) The fee of serving the complaint was not taxable unless it was served by the sheriff, and then it was taxable as sheriff's fees.

The next question is as to the sufficiency of the notice of the time and place at which the amount of costs would be settled by the clerk. If the notice were technically sufficient, still I think the practice adopted in this case was overreaching and oppressive, and should not be upheld. (*Smith v. Brown*, 2 W. R. 245.) It was doubtless adopted to prevent any objections to the illegal items included in the costs. But I think the notice insufficient. By the practice of the late Court of Chancery, a service of a summons requiring a two days' service on Saturday, for Monday was not a good service. (1 Hoff. Ch'y. Pr. 518.) By the rules of that court, the day of the hearing (Monday) would have been excluded in the computation, and by that method, Sunday being the last day of the running of the notice, should be excluded; (*Vanderberg v. Van Rensselaer*, 6 Paige, 147.) Rule 63 of this court adopts a different rule, and excludes the day of service, and this rule is not inconsistent with the Code of Procedure, (§ 407,) and still governs the practice of the court (§ 469) in cases to which it is applicable. I do not think it is applicable to a case like the present. The time for the service of the costs and notice is fixed by statute, and the law makers designed that the party should have notice of two full days, and that he should have two *business* days in which to prepare his objections to the costs, and be enabled to attend and make them. If Sunday is to be included and counted as one of those days, he has in effect but one day's notice, or perhaps, as in this case, if notice is served on Saturday night, after an attorney has left his office, for an early hour on Monday morning, he has no notice at all. There was in this case no available notice of the time and place of the settlement of the amount of the costs. In the computation of the time fixed by statute for the performance of an act or within which an act is to be or may be done: if the time so fixed is less than a week, Sunday should not ordina-

rily be estimated as a part of the time if it should happen to intervene. The intention will be held to be that the full number of *business* days mentioned by the statute, should be allowed to the party, unless a different intention is apparent from the act itself. A different rule holds when one or more Sundays must necessarily come within the time fixed by the statute. (2 Hill, 375; *Thayer v. Felt*, 4 Pick. 354.) The proceedings of the plaintiff were, therefore, irregular, as well as oppressive, and must be set aside. Costs of the motion would be granted, had not the defendant asked more in his notice than he is entitled to, and for this reason costs are not granted. (*Bates v. Loomis*, 5 W. R. 78.)

This part of the motion is granted, unless plaintiff's attorney stipulates to deduct \$24.32 from the amount of the costs included in the judgment, and if such deduction is made, then the motion is denied without costs to either party.

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#### JAMES HOVEY and wife vs. JAMES M'CREA.

In the computation of time for service of notice of motion, &c., *five* days is sufficient (under the code) for any number of miles *under* one hundred. The code intending to require five days' notice for fifty miles, and six days for (additional fifty,) one hundred miles, and so on. An injunction cannot be granted (on motion) under the first branch of § 192 of the code (original) without the complaint contains a demand for it, as part of the relief sought. Nor can it be granted under the second branch of that section, unless the act to be prevented shall "tend to render the judgment," which is sought to be obtained, "ineffectual." *It seems* that, under this latter branch of the section 192, the necessity should *arise during* litigation.

Thus, where plaintiffs moved for an injunction, to restrain the defendant from proceeding in action of ejectment, and demanded in their complaint (after setting out an agreement to convey the premises to plaintiffs,) relief as follows: "Wherefore, the said plaintiffs demand judgment that said J. M'C. shall fulfil his said agreement, and give them a deed of the above described premises, and that their costs be awarded to them on this complaint." *Held*, that an injunction could not be granted under the code, § 192.

*St. Lawrence Special Term, December, 1848.*

Mr. RUSSELL, *for plaintiff*.

Mr. DART, *for defendant*.

HAND, Justice.—This is a motion for an injunction to restrain the defendant from proceeding in an action brought by him to recover two parcels of land which plaintiffs say should be conveyed to them. The complaint alleges that the defendant made an agreement with the plaintiffs, by which he was to convey about 25 acres to James Hovey, and

also a smaller piece to his wife for life, all for a gross sum. If the contract was in fact made with both of the plaintiffs, as the piece agreed to be conveyed to the wife was a building spot, contiguous to the other; probably she will not be willing to take a conveyance of that unless the other shall also be conveyed to her husband; and perhaps she may be entitled to join him as co-plaintiff under the code, in a suit for both pieces. If the complaint is true, there may be such part-performance as *prima facie* entitles the parties to a deed. Admitting all this to be so, are the plaintiffs entitled to an injunction on this motion?

The first objection is, that Canton is over ninety miles from the residence of the defendant's attorney, though less than one hundred miles. The code, (§ 874) requires the service to be five days "if the person to be served reside within fifty miles of the place where the hearing is to be had; and, for every additional fifty miles, one day shall be added to the time of notice." "There is not an additional fifty miles," although nearly so, and a part of a day cannot be added to the time. The language of the code is not clear, but I think five days must answer for any distance under one hundred miles. If forty-nine be the highest whole number within fifty days, fifty added thereto will make ninety-nine. But I can not think this the true construction. "Within" means, here, "not exceeding," "not beyond," which are some of the definitions given by Webster: and the spirit of the act is, that fifty miles require five days, and one hundred miles six days, and so on. If I am right, then five days' notice in this case was sufficient.

The next question is on the merits of the motion. The complaint does not demand an injunction. The demand of relief is very brief and is as follows: "Wherefore, the said plaintiffs demand judgment that said James M'Crea shall fulfil his said agreement, and give them a deed of the above described premises, and that their costs be awarded to them on this complaint." Section 192, of the code, directs that when it shall appear by the complaint, that the plaintiff is entitled to the relief demanded, such relief, or any part thereof, consists in restraining the commission or continuance of some act of the defendant, the commission or continuance of which, during the litigation, would produce great or irreparable injury to the plaintiff; or where, during the litigation, it shall appear that the defendant is doing, or threatens, or is about to do, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual. A temporary injunction may be granted to restrain such act." The 193d section enacts that "the injunction may be granted at the time of commencing the action, or at any time

afterwards, before judgment upon its appearing satisfactorily to the judge by the affidavit of the plaintiff, or of any other person, that sufficient grounds exist therefor. A copy of the affidavit must be served with the injunction." The power to grant the injunction, so far as that power depends upon the code, is found in the section 192. By that it may be exercised, as I understand it, though the provisions are rather obscure, in two classes of cases: 1st, where an injunction is prayed for in the complaint and the act sought to be restrained, will, during the litigation, produce great or irreparable injury; 2d, where during the litigation it shall appear that some act is being done or threatened, or about to be done, violating plaintiff's rights, and tending to render the judgment ineffectual. The first class of cases evidently requires that the cause or necessity of the injunction should exist when the action is commenced, and in that case an injunction must be the relief "demanded," or a part of that relief. This means the relief demanded in the complaint, not that asked for on the action. In this case the act of the defendant in getting possession by ejectment could not do "irreparable injury" to the plaintiffs, but if they have paid or tendered all the purchase-money, and built on the premises and possessed it for six years, and are entitled to a deed, it might do "great" injury to put them out of possession, and that is sufficient cause if there were no other objection. But the omission of the proper demand for relief, renders the first branch of the § 192 inapplicable.

Nor does the last branch of the same section aid the plaintiffs. The act to be prevented must "tend to render the judgment," which the plaintiff is seeking to obtain, "ineffectual," which is not this case. In addition to this, I am not certain but the necessity for an injunction should *arise during* litigation. The language is "where during litigation it shall appear that the defendant is doing, or threatens, or is about to do" the act. This is analogous to the former practice. As a general rule, an injunction could only be issued on filing an injunction bill, that is, a bill asking for an injunction in the prayer for relief and for process. But where the court, having full cognizance of the matter, has by its own decree taken it into its own hands, it will interfere by its injunction to prevent injury to the property, either by the parties litigant or others, although there is no injunction prayed by the bill. (Daniels' Ch. Pr. 1884; *Matter of Hemmip*, 2 Paige, 819; 3 Sim. 278; 1 Barb. Ch. P. 619; 1 Hoff. Ch. Pr. 77; *Clark v. Judson*, 2 Barb. S. C. R. 90, and cases there cited.) It is safer, in a matter so important as the granting of an injunction, to follow the beaten path of long experience, where it can be done without violating the provisions of the statute.

The 193d section, I do not think, dispenses with the requirements of § 192. It probably was intended the motion might be made upon affidavit, but the necessary facts, the "sufficient grounds" to bring the case within § 192, should be set forth. Whether § 193 prescribes the only manner of making the motion, or leaves the former practice in force, it is not necessary here to decide. It may be added that, in a case of this kind, I think security should be required under § 195. Had the complaint been filed in the cause after a verdict in the first suit, another statute would have applied. The motion must be denied.

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### SUPREME COURT.

In the matter of ROBERT PATTERSON, an habitual drunkard.

As to acts done by a lunatic or drunkard before the issuing of a commission, and which are overreached by the retrospective finding of the jury, the inquisition is only presumptive, and not conclusive evidence of incapacity. But all gifts and contracts made by him after the actual finding of the inquisition, and until he is permitted to resume the control of his property, are utterly void.

While, therefore, the commission remains unrevoked, the lunatic or habitual drunkard cannot make a valid will without permission of the court. The existence of the commission will be held conclusive against the validity of the will.

An application to the court for an order to remove this technical objection is addressed to the discretion of the court, and may be made *ex parte*, or on notice to the committee and next of kin, as the court shall direct.

*Albany General Term, March, 1849.*—Before Justices HARRIS, WATSON, and PARKER. This was an appeal from an order of Mr. Justice Watson denying a motion to set aside an *ex parte* order allowed by him at chambers, suspending an inquisition of habitual drunkenness, &c., against Robert Patterson, so far as to permit him to make a will.

On the 17th of December, 1847, Patterson was found to be incapable of managing his affairs in consequence of habitual drunkenness, and a committee was appointed on the 6th January following. The order permitting him to make a will was made on the 26th April, 1848, on a personal examination of Patterson, and on several affidavits showing his entire abstinence from the use of liquors since the execution of the commission, and his competency in other respects to make a will, and was made without notice to the committee or next of kin. Patterson died on the 8th of February, 1849, pending an application to have his property restored to him, and leaving a will wherein he devised all his real estate, consisting of a farm of about 200 acres of land, to his executors in trust to pay the legacies therein mentioned. The probate of the will was opposed by

four of the heirs-at-law, in whose behalf the motion was made to vacate the order permitting Patterson to make a will.

J. H. REYNOLDS, for the motion, insisted that the order was irregular and improperly allowed; that the committee and heirs-at-law were entitled to notice and cited 2 Barb. Ch. R. 208.

G. VAN SANTVOORD, in person, for the executors contended that the property of Patterson was vested by the statute in the Court of Chancery and not in the committee; that the application was to the discretion of the court, and the order was obtained merely to remove a *technical* objection; that the heirs-at-law had no interest in the estate in Patterson's life time and were not adverse parties, and therefore not entitled to notice of the order; that an inquisition of lunacy did not *per se* create an incapacity to make a valid will, and that this court should not set aside an order merely to make a party to interpose a technical objection. He cited *Stewart's Exrs. v. Lispenard*, 26 Wend. 255; *Stone v. Damon*, 12 Mass. R. 488; 2 John. Ch. R. 247; 1 Hill, 97; 2 R. S. 3d ed. 114, 118.

By the Court. PARKER, Justice.—The first question to be determined is whether Patterson could make a valid will, during the existence of the commission, without permission of the court.

In *White v. Palmer*, 4 Mass. R. 147, it was intimated by Parsons, chief justice, that a letter of guardianship of a person adjudged to be *non compos* so long as it remained unrevoked was *conclusive* evidence of his insanity; but upon that point, the court declined to give any opinion, and the cause was decided on the ground that the letter of guardianship was *prima facie* evidence that the ward was not of sound mind. In the late case of *Stone v. Damon*, 12 Mass. R. 488, the same court held, that if a lunatic under guardianship be restored to his reason, he may make a will although the letters of guardianship be unrepealed. In such case, the burthen of proving a restoration to reason, was cast on the person claiming under the will. The rule seems therefore to be settled in Massachusetts, that the letter of guardianship is only *prima facie* evidence of insanity, as to acts done after the date of the decree appointing the guardian.

But I think a different rule has been established in this state. In *L'Amoureux v. Crosby*, 2 Paige, 422, the chancellor held that as to acts done by the lunatic or drunkard, before the issuing of the commission, and which are overreached by the retrospective finding of the jury, the inquisition is only presumptive, and not conclusive evidence of incapacity; but that all gifts of the goods and chattels of the idiot, lunatic or drunkard, and all bonds and other contracts, made by him after the actual finding of the inquisition declaring his incompetency, and until he is permitted



to assume the control of his property by the permission of the court are utterly void. (See, also, Beverly's case, 4 Coke's R. 126; *b.* 127, *a.*)

In the matter of Burr, a lunatic, 2 Barb. Ch. Rep. 208, this doctrine was applied, and the court made an order permitting Burr to make a will, and providing for his protection against the exercise of any undue influence.

I do not think, therefore, that Patterson could, in this case, have made a valid last will and testament, while the commission remained unrevoked, without the order of the court permitting him to do so. The existence of the commission presented a technical objection which it was necessary to remove.

It is objected in this case, that the order of Mr. Justice WATSON, made on the 26th of April, 1848, by which the commission was so far modified as to permit Patterson to make a will, was irregular and void, because it was made *ex parte*. On whom should notice have been served? The committee had no interest in the matter: and the children who now apply to the court were not then the heirs of Patterson. *Nemo est hares inventis*. I think they had not a right to notice, but that it was entirely a matter of discretion in the justice, whether to require notice to be given; and if given, to say to whom it should be directed; and that the order made would be equally obligatory, whether made with or without notice. In many cases it may be proper to consult the family and friends of the drunkard, as well as the committee. It happens that the justice satisfied himself of the competency of Patterson, by personal examination, and by conversation with him, and satisfactory evidence was produced of his entire abstinence from the use of intoxicating liquors, since the execution of the commission.

The real and personal property of a person found incapable managing his affairs, in consequence of habitual drunkenness, is in the care and custody of the Supreme Court, and not of the committee, who is a mere bailiff acting under the authority and direction of the court, and an application for an order to allow him to make a will, is addressed to the discretion of the court, and we think such an order may, if the court think proper, be made without notice to the committee or the next of kin.

The order appealed from must therefore be affirmed.

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#### THE PEOPLE vs. VAN PELT.

An indictment found on a penal statute, should state the *precise words* of that part of the statute defining the offence. It is settled law, that equivalent words are insufficient. (See authorities cited in this case.)

*Held*, that an indictment found under the act of May 14, 1845, for selling by *retail* any intoxicating or spirituous liquors or wines, &c. could not be supported under the 15th section of the act of 1830, prohibiting the sale of any *strong* or spirituous liquors or wines in any *quantity less than five gallons* at a time, without a license.

Where a penal statute is repealed, the penalty is gone *though the repeal takes place while the prosecution for it is pending*.

*King's county Oyer and Terminer.*—Before Judge STRONG and Justices HUGHES and WRIGHT, December 15th, 1848. The defendant had been indicted during the pendency of the act relating to excise and to licensing retailers of intoxicating liquors, passed May 14th, 1845, for selling by retail strong and spirituous liquors and wines, in Brooklyn, after the electors of the city had voted, pursuant to the third section of that act, that no license should be granted for such purposes. There had been no trial, and it was moved in behalf of the defendant that the indictment should be quashed on the ground that the statute under which it had been found had been repealed.

The motion was argued by Mr. WARING for the defendant, and Mr. DURYEA, district attorney, for the people.

STRONG, Justice.—It has been argued in behalf of the prosecution that the indictment is valid under the provisions of the act relating to excise incorporated in the Revised Statutes of 1830, and can be sustained notwithstanding the repeal of the act of 1845. The 15th section of the act of 1830, prohibits the sale of any strong or spirituous liquors or any wines in any quantity less than five gallons at a time, without a license. There is no charge in the indictment in question for selling in any quantity less than five gallons at a time. The only direct allegation in reference to quantity is that the defendant sold by retail. That would be appropriate under the act of 1845, but would be insufficient in an indictment found on the 15th section of the act of 1830. A sale by retail is not necessarily in a quantity less than five gallons, and even if it was, that would not dispense with the necessity of inserting in the indictment the precise words of that part of the statute defining the offence. It has long been the settled law that equivalent words are insufficient. (1st Chitty's Criminal law, 218 to 286; 1 East. 157; 1 Leach Criminal Law, 82, 556; Hawkins' Pleas of the Crown, b. 2, ch. 25, § 110.)

The 16th section of the act of 1830, prohibits the sale of any strong and spirituous liquors or wines, to be drank in the houses &c. of the vendor without a tavern-keeper's license. There is no charge in the indictment found in this case, that the defendant sold any liquor to be drank in his house or in any place mentioned in the prohibition contained in the section which I have last quoted, there is no other offence specified

in the act of 1830, and consequently the indictment in question cannot be supported under that act. I am inclined to think that the prohibitory clauses of the act of 1830, became inapplicable to the city of Brooklyn after the electors had voted that no license should be granted in that city, except to determine the species of offence, and the extent of punishment for any violation of the 5th section of the act of 1845. That section provides that, whenever the electors of any city or town shall have determined that no license shall be granted in such city or town, whoever shall sell by *retail* any intoxicating or spirituous liquors or wines, or in any manner or by any device, shall sell by retail within such city or town, shall be liable to all the penalties imposed by the excise law of 1830. It describes and provides for a general class of offences which includes all sales by retail except by physicians for medical purposes. It became a substitute for, and (if I may use the expression) absorbed the prohibitory clauses of the act of 1830. There were some changes, too, not merely verbal but substantial; "intoxicating" was substituted for "strong," "retail" for "quantities less than five gallons" and the reference to licenses was wholly omitted, as it should be, as no licenses could be granted after the electors had voted against them. The prohibition contained in the act of 1845 was positive, not, as in the act of 1830, conditional. The alterations were so considerable that the provisions of the act of 1845 could not be considered as cumulative, but were so far elemental as to change the identity of the offences, and those specified in the act of 1830 no longer existed, except as they were incorporated in a modified form in the more recent statute. If I am right in my last position, it follows that after the vote of the electors of Brooklyn against licenses, no valid indictment could be found for offences alleged to have been committed there under the act of 1830. The learned and able jurist, who was district attorney at the time when the indictment in question was drawn, probably entertained the same opinion, as it is evidently wholly based upon the act of 1845. There is but one departure in the use of the word "strong" instead of the word "intoxicating" to characterize the liquors sold. If such liquors were strong, they were undoubtedly intoxicating, and that might be, in the opinion of a non-professional man, sufficient, but the technical rule to which I have alluded, that the *very words* used in the statute to describe the offence, must be inserted in the indictment might be fatal to that now under consideration. It is not necessary, however, to decide that question here.

It is very clear that if this indictment can be supported at all, it must be under the act of 1845. I have already said, that it is at least doubtful

whether it was drawn strictly in compliance with the provisions of that act. But if it had been free from all objections at the time when it was presented, it can not now be sustained, as the act of 1845 has been unconditionally repealed. I take it to be the settled rule, that where a penal statute is repealed, the penalty is gone, though the repeal takes place while the prosecution for it is pending. In the case of *Key v. Gardiner*, 4 Moore and Payne's Reports, 341, 351, the late Chief Justice Tindall said: "I take the effect of a repealing statute to be to obliterate the statute repealed as completely from the records of the parliament as if it had never passed, and that it must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted, and concluded whilst it was an existing law." The same opinion is expressed and ably supported by Judge Cowen, in the case of *Butler v. Palmer*, 1 Hill, 324, and by Judge Whittlesey, in pronouncing the judgment of the late Supreme Court in the cases cited on the argument. As a general rule it would be obviously unjust to punish one for an act which the law no longer considers as criminal. The reason for the rule may not apply with much force to this case, but it is a sound principle that no law should be bent to suit individual cases. It is certainly most desirable to suppress by all suitable means the evils of intemperance, and we accordingly instructed the grand jury at the commencement of the present term, to make diligent inquiries on the subject, and to present for trial all persons who should be proved to their satisfaction to have been guilty of any infraction of the existing law. An injunction with which, much to our satisfaction, they have faithfully complied. But we can not, even in the support (if support it may be called,) of the best of causes, dispense with a rule of law which we find laid down by the greatest authorities, and nowhere controverted. The consequence is, that the indictment in question having no longer any foundation upon which it can stand, must be quashed.

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#### SUPREME COURT.

JEREMIAH VAN VALKENBURGH and ELIZABETH VAN VALKENBURGH,  
vs. GEORGE N. ALLENDORPH, CATHARINE E. ALLENDORPH and JOHN  
MYNDERS et al.

*It seems* that judgment may now be entered upon the report of referees upon the whole issue without the aid of a judge. But whether in cases coming within § 306, (amended code,) referees can pass upon the question of *costs*. *Quære*.

If power can be given to a referee to dispose of the question of costs in equity suits

pending on the first of July, 1848, the authority should be distinctly expressed in the order of reference.

*Rensselaer Special Term, June, 1849.*—The bill in this cause was filed previous to July 1, 1848, to foreclose a mortgage given in 1837, due and payable in 1844. Defendants Allendorphs put in answer to the amount due, and John Mynders as to the priority of his mortgage, to the plaintiffs' mortgage. An order of reference was entered by consent, referring it to a sole referee, "to hear the proofs and allegations of the parties, and to determine the matters in controversy in this suit."

JOHN FITCH, *for plffs.*

ANSON BINGHAM, *for defts.*

On the argument upon the proofs, the referee intimated his intention to report upon the question of costs, whereupon the plaintiffs' attorney made a motion to amend the order of reference, so as to confine the referee to the questions of amount due, and priority of the mortgages only.

HAND, Justice.—Section 202 of the code (now substituted for § 227,) has perhaps altered what I considered the correct practice when *Deming v. Post*, was decided. That alteration alone would have hardly made the difference, as it required the judgment upon the report to be entered in the same manner as if the action had been tried by the court; and in that case judgment must be entered upon the direction of a single judge. (§§ 267, 278.) But taken in connection with § 278, I am inclined to the opinion that judgment can now be entered upon a report of referees upon the whole issue, without the aid of a judge. But whether in cases coming within § 306, the referee can pass upon the question of costs, settle the decree, &c., it is not now necessary to decide.

But this suit was pending on the 1st of July, 1848, and § 5 of the amended supplementary act is applicable thereto. The order of reference in this case empowered the referee to hear the proofs and allegations of the parties, and determine the matters in controversy. But the question of costs I do not think one of the matters referred. The report, it is true, stands as the decision of the court, the same as though the cause or issue had been determined by the court at a special term. This language is very broad, but when taken in connection with § 421 of the code, and § 3 of the amended supplementary act, I do not think that all the former practice in "existing suits" is so far abrogated, that the referee, under such an order, can decide all incidental questions, as of costs, &c., thereon. If power to dispose of the question of costs, can be given to a referee in such cases, I think the authority should be distinctly expressed in the order of reference. If this view is correct, no amendment of the order of reference is necessary.

## SUPREME COURT.

## ROBERT GAMBLE vs. WILLIAM C. BEATTIE.

Where an answer was verified in pursuance of § 133 of the original code, and served on the 11th day of April, 1849, the day of the passage of the amended code, *held*, that the answer was properly verified—the complaint having been verified in the same way.

*Held*, also, that the amended code should be construed to take effect *twenty days after its passage*. That the last section of the amended code should be considered as a portion of the original code, and applicable to such portions of the amended code as existed prior to April 11, 1849. By considering the amended code as a *substitute* for the original, to take effect on the 1st of July, 1848, would be to give it a retrospective effect, contrary to the settled principles applicable to the construction of statutes.

*Dutchess Special Term, June, 1849.* The complaint was founded upon a promissory note and verified by the oath of the plaintiff's attorney to the effect that he believed it to be true, and it was served on the 24th March, 1849.

The answer denies the substance of the complaint and sets up payment; and is verified in the same manner by the attorney for the defendant. It was served on the 11th day of April, 1849, the day on which the amended code was passed.

On the 30th day of April, the plaintiff, disregarding the answer, perfected judgment for the amount claimed by him.

The defendant now moves to set aside this judgment.

E. H. BREWSTER, *for defendant.*

J. W. BROWN, *for plaintiff.*

BARCULO, Justice.—It is first necessary to determine whether the code abolished the 92d rule requiring a special verification to a plea in bar to a declaration upon a written instrument or record. That rule refers to *declarations* and *pleas* which the code has abolished. The latter had also adopted a new mode of verification applicable to all cases of complaints and answers, whether the action be founded upon a written instrument or not. I think, therefore, that the answer was sufficiently verified so far as the old code is concerned.

But is insisted that the amended code being passed on the same day, must be deemed to have been in force the whole of that day; and that therefore the new mode of verification prescribed by section 157 must govern.

It is very clear that this answer is not verified according to the section

last cited. But it is not by any means so clear that the defendant was bound to verify it in that manner. There is no provision in the amended code declaring that it shall take effect *immediately*. It follows, therefore, that it went into effect twenty days after its enactment, or on the first day of July, 1848.

This latter construction, I understand, was designed by one of the principal framers of the act; but it seems hardly consistent with the settled principles applicable to the construction of statutes. It seems to me that it will be more consistent with the general objects of the Legislature to consider the last section of the amended code as a portion of the old code, and applicable to such portions of the new code as existed prior to the 11th of April, 1849. To adopt the other view, and deem the amended code a substitute and put in the place of the former one, which is thereby obliterated, would be giving a retrospective effect to the law which must produce great confusion and work no little mischief. For notwithstanding the supposed intuition of modern law makers, it can hardly be conceived, I apprehend, that *suitors* can as yet foresee, and govern themselves by future acts of legislation. I am inclined, therefore, to construe the act as taking effect twenty days after its passage.

This conclusion is not, however, necessary to the decision of this case. For if the amended code is held to have effect from the first of July, 1848, it will not save the plaintiff's judgment. The amended code does not require the answer to be verified at all unless the complaint is duly verified. If, therefore, this act was in force in March, the complaint is not duly verified, and consequently the answer is good without any verification.

I shall therefore direct this judgment to be set aside and allow the plaintiff twenty days to reply to the answer. But as this is one of those mistakes naturally arising from an ill-digested and ever-varying code, he is not to be charged with costs of this motion.

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## SUPREME COURT.

### ROBERT S. LIVINGSTON against PHILIP B. MILLER.

*Costs of appeal* (\$45) to the general term, upon a bill of exceptions taken at the circuit, may be allowed to a plaintiff upon a final recovery, where the action comes within those mentioned in § 304 of the amended code. The last clause of sub. 6, of section 307 of the amended code must be rejected as repugnant to the other provisions, and the latter must prevail.

*Dutchess Special Term, June, 1849.*—This action was commenced under the code, and tried at the last December circuit in Columbia. The plaintiff obtained a verdict upon which a judgment was rendered. The defendant made a bill of exceptions and appealed to the general term. The cause was argued, and decided in favor of the plaintiff, at the general term held in Poughkeepsie in May last. In entering up final judgment, the clerk inserted \$45 for the plaintiff's costs on the appeal.

The defendant's counsel now moves to strike out the costs on the appeal on the ground that the amended code does not give costs on an appeal from a judgment.

WM. ENO, *for defendant.*

JNO. THOMPSON, *for plaintiff.*

BARCULO, Justice.—I have no doubt of the power of this court, at a special term, to entertain a motion of this kind and review and correct the proceedings of the clerks in entering up judgments, and inserting the costs of the party entitled thereto. I shall therefore briefly examine the question *whether costs are allowable on an appeal to the general term from a judgment entered upon the direction of a single justice.*

By the original code (§ 262, sub. 5) costs in suits on an appeal were clearly given. But the amended code has added to that subdivision the words, "but this provision shall not apply to appeals in cases other than those mentioned in section 349." Section 349 does not include or relate to appeals from judgments entered upon the direction of a single justice. Standing, therefore, upon this subdivision alone, it would be impossible to avoid the conclusion that no costs were allowable upon such appeals. For, although such a result might be opposed to our views of justice and propriety, this is by no means sufficient to authorize us to disregard or alter a statute which speaks intelligibly. Nor do I think that we can safely say that the Legislature have made a mistake and inserted the word "not" instead of "only," as has been suggested. Such violence can only be done to a statute which is not *intelligible* without an alteration.

But there is another principle in the construction of statutes which must govern this case. Section 304 gives costs absolutely to a plaintiff upon a recovery in certain cases, of which this is one. That these costs will attach to the suit in whatever stage the judgment may be entered, whether on the direction of a single justice, or on appeal, is a proposition too plain to admit of discussion, in the absence of any other statutory provision. The only exception to this absolute right to costs is found in section 306, which makes costs on appeals *discretionary* in cases of



granting a new trial and when a judgment shall be affirmed in part and reversed in part.

Applied to the case before us, section 304 gives the plaintiff the right to his costs on the appeal. The only remaining difficulty is, to ascertain the amount of those costs. This is to be done by a reference to the original code, which fixed the amount as charged in this bill. The last clause of sub. 6 of section 307 of the amended code being repugnant to the other provisions, must give way and the latter prevail; or, in other words, the *amendment* to sub. 5 of section 262 of the original code, which is contained in sub. 6 of section 307 of the amended code, must be rejected as repugnant to the preceding provisions, and the original reading must prevail.

The motion must therefore be denied, but without costs.

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## SUPREME COURT.

JOHN MCNAMARA agt. JOSEPH L. BITELEY.

Where title is set up in a Justice's Court by answer, under the code of 1849, and a new suit is instituted in the Supreme Court, for the same cause of action to which the defendant interposes the same answer as before the justice, a reply in this court on the part of the plaintiff is not necessary; and if put in, will be struck out on motion.

The case of *Royce v. Brown*, 3 Howard's Sp. T. Rep. 391, was under the code of 1848, which has been altered as to the code of 1849, as to pleadings in causes arising in Justices' Court.

Under the code of 1849, a reply to an answer in the Justice's Court is not necessary, in any case. The cause is at issue before the justice without it.

In April last the plaintiff commenced an action before a justice of the peace of the county of Saratoga. On the joining of the issue, the plaintiff complained against the defendant as follows: "The plaintiff complains and says that on or about the second day of March, 1849, he purchased of one John Haley, for a valuable consideration, a dwelling-house or shanty, situate in the town of Moreau in the county of Saratoga, that the said defendant has since that time taken down and converted a part, or all of the said shanty, belonging to the plaintiff, to his own use, to the great damage and injury of the plaintiff. Whereupon the plaintiff demands judgment against the defendant for fifteen dollars, with interest from the first day of April, 1849." Signed, &c.

The answer of the defendant was in writing, as follows: "Defendant answers the complaint in this cause, and says that the shanty referred to in complaint was not the property of the plaintiff. That said shanty was on the lands of the defendant and a part of the realty; that said shanty was unoccupied and was not leased, let, or in any way conveyed to said plaintiff; that John Haley never owned said shanty, or had a deed or conveyance of the same, or authority to sell the same to plaintiff or any one; that defendant never converted any stuff of plaintiff's to his use." Signed, &c.

This answer was delivered to the justice, who countersigned the same, and delivered it to the plaintiff. The defendant also gave the written undertaking required by § 56 of the Code of Procedure, and the suit was thereupon discontinued before the justice.

About the 10th of May the plaintiff commenced an action in this court for the same cause of action as before the justice, and deposited with the justice a summons and complaint, as required by the code, the said complaint being in substance the same as that before the justice. The defendant, on the 19th of May, gave an admission of service, and on the 30th May served a copy of his answer, being the same in substance as the one used before the justice. The plaintiff afterwards, and within the time required for that purpose, served a reply to the said answer, in substance as follows: "The above-named plaintiff replies to the answer of the above-named defendant, and says that the shanty referred to in the complaint was the property of the plaintiff, and that John Haley, of whom the plaintiff purchased the same, had a right to sell and convey the shanty to the plaintiff, he, the said Haley, being the lawful owner of the said shanty at the time that he conveyed the same to the plaintiff.

"And the plaintiff further replies, that if the said shanty was upon the lands of the defendant, it was put there by the consent of the defendant, with the express understanding that the owner of the said shanty might remove the same from the premises of the defendant, and that the same was not to become a part of the defendant's realty, and that the defendant was not to have any claim upon, or exercise any control over the said shanty.

"And the plaintiff alleges that the defendant has converted the said shanty as stated in the complaint; and that the said shanty, at the time of such conversion, was the property of the plaintiff." Signed, &c.

A motion was made by the plaintiff before WILLARD, J., at special term, to strike out said reply.

A. D. WAIT, *for the plaintiff*, contended that the reply was a *depart-*

ure from the complaint. He insisted that after the answer was put in before the justice, the plaintiff should have amended the complaint, and then the justice would have had jurisdiction. He cited the *People, &c. v. Rensselaer Common Pleas*, 2 Wend. 647; *Tuthill v. Clark*, 11 Wend. 644; and 12 Wend. 207; and *Brotherson v. Wright*, 15 Wend. 237.

A. MEEKER, *contra*, cited Code of Procedure, § 56-63.

WILLARD, Justice.—The action before the justice, according to the former classification of actions, was trover for a shanty. It contained but one count, setting up, in the briefest form, the ownership of the plaintiff and the conversion by the defendant. Under the act for the recovery of debts to the value of twenty-five dollars, passed April 5, 1813, the plea of title could only be interposed before a justice in an action of *trespass* on land or other real estate, and if the title to land in other actions, came in question, the justice was ousted of jurisdiction without plea. (1 R. L. 387, 388, § 1-7.) The 9th section of the act of 1824, which extended the jurisdiction of justices of the peace to fifty dollars, allowed the plea of title to be interposed in *any action* wherein the title should come in question, and in other respects left the jurisdiction as before. The Revised Statutes contain the same provisions, with some slight modifications. (2 R. S. 236, 237, §§ 59-66,) and the same sections are re-enacted in the Code of Procedure, with some trifling changes in the phraseology. (Code of Procedure, §§ 55-63.) By the existing law, therefore, the defendant may, or may not, at his election at the joining of issue in any action before a justice, interpose, by way of defence, in his answer, matter showing that title to land will come in question. If the requisite steps be taken, as prescribed in the code, and the plaintiff, within the time required for that purpose, commences an action in this court for the same cause, and complains for the same cause of action only on which he relied before the justice, the answer of the defendant must be the same which he made before the justice. (Code, § 60.) If the judgment be for the plaintiff, in the Supreme Court, he shall recover costs. If it be for the defendant, he shall recover costs, except that upon a verdict he shall pay costs to the plaintiff, unless the judge certify that the title to real property came in question on the trial. (§ 61.) If the plaintiff complains for a different cause of action, or the defendant sets up a different defence in his answer, from that used before the justice, the proper remedy of the adverse party is by motion to this court, to strike out the pleading, and require it to be conformed to that which was interposed in the court below. (See per SAVAGE, Ch. J.

in *Brotherson v. Wright*, 15 Wend. 240, and *Tuthill v. Clark*, 11 Wend. 642.)

The defendant was not bound to interpose title as a defence in this case, in order to deprive the justice of jurisdiction: for if it should appear on the trial, from the plaintiff's own showing, that the title to real property was in question, and such title should be disputed by the defendant, the justice was required to dismiss the action and to render judgment against the plaintiff for his costs. (Code, § 59.) The law was the same before the code. (2 R. S. 287, § 63.) In *Royce v. Brown*, 3 Howard's Sp. T. Rep. 391, I intimated that when an action commenced before a justice, and arrested there by an answer setting up title, was followed up by an action in this court for the same cause of action, the plaintiff must reply to the defendant's answer, or it would be taken as admitted. That case arose and was decided under the code of 1848, the 57th section of which made the provisions of the act relative to pleadings, applicable to suits in justices' courts. Hence, every material allegation in the answer not specifically controverted in the reply must, by § 144 of the code of 1848, be taken as true. But the code of 1849, under which the present suit is brought, has omitted the 57th section of the old code, and substituted for it the 64th section of the new code, which limits the pleadings in justices' courts to the *complaint* on the part of the plaintiff, and the *answer* on the part of the defendant, allowing either party to demur to his adversary's pleading, or any part thereof, when it is not sufficiently explicit to enable him to understand it, or it contains no cause of action or defence, although it be taken to be true. No *reply* is required or permitted to be interposed to an answer, whether it sets up new matter or not. And hence the 168th section of the new code, which is the same as the 144th section of the old code, is not applicable to pleadings in justices' courts. The answer may contain a denial of the complaint or any part thereof, and also notice in a plain and direct manner of any facts constituting a defence. Pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended. (§ 64, sub. 4, 5.) The answer in this case before the justice should be treated merely as denying the plaintiff's cause of action, and setting up for the purpose of ousting the justice from jurisdiction, title in the premises by way of notice. On a new action being brought in this court, the 60th section obviously contemplates that the complaint and answer shall be as before the justice, without any further or additional pleadings. The case of *Royce v. Brown*, *supra*, is not applicable to actions under the code of 1849. There is no doubt that

one object of the changes in the new code was to obviate the embarrassments growing out of the application of the rules of pleading to justices' courts, some of which were exemplified in that case.

The reason why, under the code of 1848, and also under the practice which preceded it, the plaintiff must reply in this court to the plea of title was, that without such reply, the cause would not have been at issue in the court below, had it remained there. It was necessary, therefore, when it was brought into this court, or into the Court of Common Pleas, under the old practice, by a new action for the same cause of action, and which, in truth, was a mere continuation of the action before the justice, that the pleading should be continued to the same point necessary to form an issue in the court below. In short, as the pleadings in the two courts were alike, a reply in the court above was indispensable. The same mode of reasoning applied to the code of 1849, renders a reply unnecessary. The cause was, in fact, at issue before the justice and ready for trial the moment the defendant delivered his plea and the undertaking in writing. Had he failed to deliver the undertaking, the justice must have proceeded to the trial on the issue thus formed. (Code, § 58.)

The plaintiff in this case was irregular, when he put in a reply in this court. He overlooked the alteration which has been made in the code of 1849, in the pleadings in justices' courts—and he was thus misled by the decision in *Royce v. Brown*, *supra*, which is not applicable to the existing code.

It may possibly happen that the defendant may be liable for full costs in this court, although the plaintiff may recover only fifteen dollars. This is the penalty he incurs for improperly so pleading as to oust the justice of jurisdiction, if it shall ultimately turn out that title does not come in question. The defendant was not *bound* to plead title. He acted at his peril in doing so and must take the consequences.

The motion to strike out the reply must be granted, but without costs for the reasons which have been stated.

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### SUPREME COURT.

JOSEPH B. ENOS, GEORGE W. TIFFT and GURDON GRANT vs. EDWIN THOMAS and ALFRED A. HUNTER.

A contract executed by E. T., to deliver a certain quantity of wheat to the firm of J. B. E. & Co., to be manufactured into flour, &c.—and A. A. H., for a valuable consideration, signed, at the foot of the contract, an undertaking whereby he *guaranteed*

*a full and perfect performance of the agreement on the part of E. T.* On demurrer to the complaint, in an action brought upon the contract by the firm of J. B. E. & Co., against E. T. and A. A. H., jointly, *held*, that the two instruments should be considered as one contract, and the defendants, as principal and surety, were therefore properly joined in the same action. Demurrer for that cause overruled.

*Held*, no cause of demurrer to the complaint, because the plaintiffs claimed a *sum certain* on account of the defendants' breach, without setting out an *account current* with the defendants. It is sufficient in such a case, after stating the terms of the contract, to state a performance on the part of the plaintiffs, and a failure on the part of the defendants, specifying wherein they have failed, and then the amount claimed in consequence of such failure.

*According to the terms of the contract*, drafts were alleged (in the complaint) to have been drawn by E. T. on J. B. E. & Co., and accepted and paid by the plaintiffs, if not in the firm name of J. B. E. & Co., then in the name of G. G., (one of the firm,) as and for the plaintiffs' firm name—*held*, no cause of demurrer, because it was not alleged that the drafts were drawn and paid the firm of J. B. E. & Co., (the plaintiffs) solely.

*Albany Special Term, July, 1849.* This was a motion for judgment on account of the frivolousness of the demurrer to the complaint. The complaint sets forth a contract, entered into between plaintiffs, who were partners under the firm of J. B. Enos & Co., and the defendant Thomas, whereby the latter agreed to deliver to the plaintiffs a certain quantity of wheat to be manufactured into flour, for which the plaintiffs agreed to return a stipulated quantity of flour. The plaintiffs further agreed to accept the drafts of Thomas, drawn on time, to a limited amount for which he agreed to put them in funds in time to pay them at maturity and upon his failure to do so they were to be at liberty to sell the wheat or flour for that purpose. Various other provisions were contained in the contract, not necessary to be stated.

The complaint further states that the defendant Hunter, for a valuable consideration, signed at the foot of the agreement between the plaintiffs and Thomas, an undertaking whereby he guaranteed *a full and perfect performance of the agreement on the part of Thomas*. The complaint then proceeds to state that in pursuance of the agreement a large quantity of wheat was delivered by Thomas to the plaintiffs and by them manufactured into flour; that Thomas made his drafts upon the plaintiffs to a large amount, which were accepted and paid by them—that after applying all the funds furnished by Thomas and all the proceeds of the flour received by the plaintiffs, there remains due to them a balance of \$2800, for which sum with interest they claim judgment against both defendants—execution however, only to be issued against Hunter in case an execution first issued against Thomas shall be returned unsatisfied.

The averment in relation to the acceptance and payment of drafts is as follows: "That at different times from November 8, 1848, to March

26, 1849, the said plaintiffs accepted the drafts of said Thomas drawn on time against said wheat and in pursuance of the terms of said contract—that the said drafts were accepted by the said plaintiffs in the firm name of J. B. Enos & Co., or in the name of *Gurdon Grant*, used as and for the plaintiff's firm in those particular instances, which drafts have all been paid by the plaintiffs—that the plaintiffs thus accepted and paid drafts in pursuance of said contract to the amount of \$31,000.

The defendants demurred to the complaint, alleging as grounds of demurrer that several causes of action had been improperly united and that facts sufficient to constitute a case of action were not stated in the complaint.

E. F. BULLARD, *for plaintiffs.*

J. K. PORTER, *for defendants.*

HARRIS, Justice.—I do not understand the code as having changed the rule as it previously existed, by which to determine what causes of action may and what may not be united in the same suit. It is true that it has changed, and, I think, much improved the classification of actions. But now, as before, the causes of action to be joined must be in favor of all the plaintiffs and against all the defendants, and must belong to the same class. If therefore the contract between the plaintiffs and Thomas is to be regarded as a distinct instrument containing a distinct cause of action, from the guaranty executed by Hunter, then the two causes of action could not be joined. In the one case the cause of action would exist against one of the defendants alone, and in the other case, against the other. On the other hand, if the two instruments are to be taken together, as forming in fact but one agreement between the plaintiffs on the one part and the defendant Thomas as principal and Hunter as surety on the other part, then, obviously, so far as it concerns the causes of action stated in the complaint, there is no ground of demurrer.

If in the case under consideration the guaranty, in the same terms in which it is now expressed, had been inserted above the signatures of the parties to the contract, no one would have doubted that it should be regarded as one instrument, and that an action might properly be brought against both defendants, the one as principal and the other as surety. I can see no good reason why the form of execution, or, perhaps I should rather say, the place where the parties affix their signatures, should affect the construction of the instrument. In *Hough v. Gray*, 19 Wend. 202, it was held that where one signed a note and another, under an agreement to become security for the consideration of the note, endorsed upon it an

absolute guaranty of its payment, the parties made themselves liable for the payment of the note as *joint and several promissors*. In referring to the case last mentioned, in *Miller v. Gaston*, 2 Hill, 190, BRONSON, Justice, says: "It stands upon the principle that two instruments of the same general nature, both executed at the same time, and relating to the same subject-matter, are to be construed together as forming one instrument—as he who signs on the face, and he who endorses his name on the back, both promise to do the very same thing, they may, without doing any violence to the contract, be regarded as joint makers. And as each, in form, promises for himself, the undertaking may be treated as several, as well as joint. So, in *Luqueer v. Prosser*, 1 Hill, 258, affirmed in error, 4 Hill, 320, it was held that one who guarantees the payment of a note absolutely, by an endorsement on it to that effect, made at or before the delivery, becomes, in legal effect, a joint and several maker. The case of *Hunt v. Adams*, cited by Justice Cowen, in *Luqueer v. Prosser*, from 5 Mass. 358, is strongly analogous to that under consideration. One Chaplin had made his note payable to Bennett, the plaintiff's intestate. Under the note Adams wrote as follows: "I acknowledge myself holden as surety for the payment of the demand of the above note." PARSONS, Ch. J., said that as to Bennett, the two papers must be considered as *the joint and several promissory note of Chaplin and Adams*. It was the same thing, in effect, as if Adams's name had been signed directly to the note as surety.

I do not think the case before me can be distinguished, in principle, from the class of cases to which I have referred. The guaranty of Hunter was a part of the original agreement between the parties. In *Hough v. Gray*, Cameron, the payee of the note, refused to sell the property for which the note was given, unless Hough would become security. In *Luqueer v. Prosser*, the horses for which the note was given were sold upon condition that the purchasers should give good endorsed paper. The guaranty of Prosser was received as a performance of that condition, and when received, the property was delivered. In *Hunt v. Adams*, the latter was privy to the consideration of the note signed by Chaplin and his undertaking was a part of the original agreement between the parties. So, in this case, it may be assumed that the plaintiffs will prove, if necessary, upon the trial, that Hunter was a party to the original agreement, and that it was only upon condition of his executing the guaranty that they executed the agreement whereby they bound themselves to accept the drafts of Thomas. It is plainly to be inferred, that both instruments were executed at the same time. Thomas and Hunter, in



legal effect, promised to do the same thing. A performance, by either, of what he has agreed to do, would discharge the other from his obligation to the plaintiffs. The two instruments are to be considered as one contract, and the defendants are, therefore, properly joined in the same action.

The next ground for demurrer is that the complaint does not state facts sufficient to constitute a cause of action. It must be admitted that the statements in the complaint are not, in some instances, made with much precision. But I do not agree with the counsel for the defendants, that because the plaintiffs claim to recover a sum certain on account of the defendants' breach of their agreement, they are bound to set out in their complaint an account current with the defendants, or state the process by which they arrive at the conclusion that the sum demanded is due to them. I suppose, in a case like this, it is sufficient for the plaintiffs, after stating the terms of the contract, to state a performance of the contract on their part, and a failure to perform on the part of the defendants, specifying wherein they have so failed, and then to state the amount they claim to recover as the consequence of such failure. This, I think, the plaintiffs have substantially done.

One other point, urged by the defendants' counsel in support of the second ground of demurrer, remains to be noticed. By the terms of the agreement, as it is stated in the complaint, drafts were to be drawn by Thomas upon J. B. Enos & Co.—which drafts *that firm* agreed to accept upon certain conditions and restrictions. Thomas also agreed to keep Enos & Co. in funds to meet the payment of the drafts so accepted by them. It is then alleged that *the plaintiffs*, at different times, accepted drafts drawn by Thomas "*in pursuance of the terms of the contract*"—that such drafts were accepted *by the plaintiffs in the firm name of J. B. Enos & Co.*, or in the name of Gurdon Grant, used as and for the plaintiffs' firm name in those particular instances—that all the drafts have been paid by the plaintiffs. These statements in reference to the drafts, and the manner in which they were accepted, are certainly not very explicit, but I think enough is stated to sustain the action, if made out in proof. According to these statements, the drafts were drawn upon J. B. Enos & Co., for they were drawn in pursuance of the terms of the contract. The drafts were *accepted by the plaintiffs*—if not in the firm name of J. B. Enos & Co., then in the name of one of the members of that firm used as and for the plaintiffs' firm name. If the facts should turn out in proof precisely so, I think the plaintiffs would be entitled, so far as this branch of the case is concerned, to recover, though I admit the correctness of the doctrine that the terms upon which the obligation of a surety depends

must be strictly complied with before he can be charged. It is quite possible that the proof may present such a state of facts as will exonerate the surety from liability while the plaintiffs recover the balance of their advances from the principal. However this may be, it is enough for the present occasion, that I can see that there are facts enough alleged in the complaint, if true, to sustain the action against both defendants. This, I think, the complaint contains. The plaintiffs' motion is, therefore, granted; but as the demurrer seems to have been put in, in good faith, the defendants must have liberty to answer within *ten* days after service of a copy of this order, on payment of ten dollars for the costs of this motion.

NOTE.—At the last term of the Court of Appeals held at Norwich, N. Y., on the 11th July, 1848. The question of *guaranty* was very ably discussed on the argument of a cause appealed from the Supreme Court, to wit: *Luther Hall, appellant, v. John Farmer and Harvey W. Doolittle, respondents*. The instrument and guaranty, declared on in that suit, were as follows:

"\$715.88. For value received, we promise to pay Luther Hall to the order of H. W. Doolittle and John Farmer, seven hundred fifteen 88-100 dollars with interest. March 1, 1843. (Signed) KATHERN & DOOLITTLE."

(Endorsed.) "We the undersigned guarantee the payment of the within.

(Signed)

JOHN FARMER,

H. W. DOOLITTLE."

The Supreme Court, (Justices BEARDSLEY and WHITTLESBY delivering opinions) decided that the obligation upon which the action was brought was an undertaking to answer for the debt of another, it was not a promissory note, but a collateral guaranty for Kathern & Doolittle, and no consideration being expressed therein it was void under the statute whether made at the time when the principal debt was created or afterwards. (2 R. S. 135, § 2.) It was stated, that it was wholly impossible to reconcile the numerous cases and judicial dicta on this subject, which might be found in the reports of this and other states, and the attempt would lead only to uncertainty and confusion. In such cases the statute requires the consideration to be expressed in writing, signed by the party to be charged.

SAMUEL A. FOOT, for the appellant, insisted, 1st. That the defendants were liable as makers of a promissory note. (*Prosser v. Luqueer*, 4 Hill, 420; S. C. 1 Hill, 256; *Manrow v. Durham*, 3 Hill, 584; *Miller v. Gaston*, 2 Hill, 188; *Hough v. Gray*, 10 Wend. 202.)

2d. The guaranty, or whatever it might be called, was a contemporaneous act with the signing of the body of the instrument, and supported by the same consideration. No other consideration was necessary, or existed, or could truly have been averred. It was a part of the same contract and was upheld by the same consideration. Jointly and severally, it was the same absolute promise that the debt should be paid. (*Leonard v. Vredenburg*, 8 John. 29; *Hunt v. Brown*, 5 Hill, 145; *Leggett v. Brown*, 6 Hill, 639; *Hall v. Newcomb*, 7 Hill, 416; *Curtis v. Brown*, 2 Barb. S. C. Rep. 51; *Coddington v. Davis*, 1 Comst. 186; *Haywood v. Pierce*, 10 Pickering, 228; *Hunt v. Livermore*, 5 id. 395; *Doolin v. Hill*, 2 Fairfield, (11 Maine,) 434; 1 Greenleaf's Ev. § 269.

HIRAM DENIO, for respondents, insisted. 1st. That the instrument sued on was not a promissory note. (Story on Prom. Notes, § 1; Chitty on Bills, Ed. 1839, p. 548; 1 R. S. 768,

§ 1; *Smith on Merc. Law*, 113; *Blanchénleger v. Blendell*, 6 B. & Ald. 417; *Gosh. Turn. Co. v. Hurtin*, 9 John. 217; *Cookidge v. Ruggles*, 15 Mass. 387.)

2d. It was a guaranty. (*Pitman, Pr. and surety*, I. 5, 36; *Theo. Pr. and surety*, I. 5, 36; 3 *Chitty on Coml. Law*, 317; *Chitty on Cont.* 5 Am. ed. 499; 3 *Kent's Com.* 5 Ed. 121; *Story on Prom. Notes*, § 457; *Manrow v. Durham*, 3 Hill, 591.)

3d. A guaranty is a "promise to answer for the debt, default or miscarriage of another person," and to be valid it must be in writing; and the writing must express the consideration upon which the promise is made. (*Felt on Guar.* 1; 3 *Kent*, 121; *Wain v. Writers*, 5 East. 10; *Ex parte Gardom*, 15 Ves. 287; *Saunders v. Wakefield*, 4 Barn. & Ald. 595; *Jenkins v. Reynolds*, 3 Brod. & Bing. 14; *Clancy v. Piggott*, 2 Adolph. & E. 473; *Morley v. Clarke*, 3 Bing. 107; *Sears v. Brink*, 3 John. 210; *Rogers v. Kneeland*, 10 Wend. 218 and cases referred to; *Raikes v. Todd*, 8 Adolph. and E. 846; 2 B. S. 135, § 2; *Smith v. Ives*, 15 Wend. 182; *Hacker v. Wilson*, id. 343; *Newcomb v. Clark*, 1 Denio, 226; *Bennett v. Pratt*, 4 id. 275; *Almunt v. Aspenden*, 5 Mann. & Gr. 392.)

4th. There was no consideration in fact for the instrument signed by the defendants, on which the suit was brought, and for that reason it was utterly void. (*Chitty on Bills*, Ed. 1842, 73, 64, and cases in note 2; *Halliday v. Atkinson*, 5 B. & C. 501; S. C. 8 Dow. & RyL 163; *Schoonmaker v. Rosa*, 17 John. 301; *Bank of Troy v. Topping*, 9 Wend. 273; *Tenney v. Prince*, 7 Pick. 243; *Hill v. Buckminster*, 5 id. 391; *Coml. Bank of Lake Erie v. Norton*, 1 Hill, 501; *Slade v. Halsted*, 7 Cow. 322.)

This case will probably be decided by the Court of Appeals at the next September term, to be held at Buffalo. A reference will be made to the decision hereafter.

## SUPREME COURT.

GILBERT L. WILSON, Receiver, &c., vs. FREDERICK W. ALLEN and others.

Upon an appeal, from a judgment entered upon report of a referee, to the general term, the party prevailing is entitled to *costs of the appeal*, (§45) notwithstanding the provisions of the last clause of sub. 6, of § 307 of the amended code. *Held*, that the clause last mentioned must be rejected altogether, as totally and irreconcilably repugnant to every other part of the same act, upon the same subject. (See *Livingston agt. Miller*, ante, page 42.)

*Albany Special Term, Aug. 7, 1849.*—This was a motion to strike out of the judgment certain costs alleged to have been improperly inserted therein by the clerk. The action was tried by a referee, who made a report in favor of the plaintiff, upon which judgment was perfected. The defendants appealed to the general term, and upon such appeal the judgment was affirmed. When the judgment was entered the defendants objected to the allowance of any costs upon the appeal, upon the ground that none were allowed by law. The objection was overruled by the

clerk, some items being objected to, which are noticed in the opinion of the court. The clerk allowed \$65 for costs upon the appeal, and \$12.29 for disbursements and interest upon the report.

E. F. BULLARD, *for defendants.*

G. L. WILSON, *in person.*

HARRIS, Justice.—The decision of this motion involves an important and somewhat difficult question, arising upon the 6th subdivision of the 307th section of the code. If the last clause of that subdivision is to be literally applied, it follows that at least \$45 of the costs allowed by the clerk must be stricken out of the judgment. Then the only costs which could be allowed to the plaintiff, would be ten dollars for each term of the court at which the cause was necessarily on the calendar, and postponed or not reached, allowable under the 8th subdivision of the same section, and the disbursements which may be allowed under the 311th section. Then, indeed, no other costs can be allowed, on any appeal from an inferior court to the Supreme Court, or from a *judgment* entered upon the direction of a single judge to the general term of the same court. No one can fail, I think, upon an examination and comparison of the various provisions of the code, upon the subject of costs, to come to the conclusion that, whatever else may have been the intention of the Legislature, such *was not* their intention.

With the exception of this single clause, all the provisions of the code relating to costs upon appeal, are consistent and harmonious. The same security for costs is to be given upon an appeal from an inferior court to the Supreme Court, or a judgment rendered by a single judge to the general term, as upon an appeal to the Court of Appeals. And yet, why require such security for costs, when no costs, or none but disbursements, may be recovered? The amount of costs, too, recoverable upon appeal in the different courts, is graduated according to the dignity of the court and the probable expense of employing counsel. Upon an appeal from a justice's judgment to the County Court, it is *twelve* or *fifteen* dollars, as the judgment is affirmed or reversed. In the Supreme Court, the amount is \$45; and in the Court of Appeals, \$75. But why, it may be asked, should \$45 be fixed as the amount of costs on appeals in the Supreme Court, if it was intended that no costs should be recovered?—or why should the prevailing party in the County Court and in the Court of Appeals recover costs when in the same case no costs are given in the Supreme Court?

Again, it is provided by the 306th section that when, upon an appeal,

*a new trial shall be ordered*, the costs of the appeal shall be in the discretion of the court. But if the 6th subdivision of the next section is, by its last clause, rendered inapplicable to appeals from judgments, how is effect to be given to this provision of the 306th section? Costs, in case of a new trial, are in the discretion of the court; but what costs? The only costs upon appeal are fixed by a provision declared to be inapplicable. Suppose, then, a new trial ordered upon appeal, and the court, in the exercise of its discretion, thinks proper to award costs to the prevailing party. What are the costs he is to recover? Clearly nothing, unless the 6th subdivision of the next section defines them. But to allow that subdivision to determine the costs to be recovered, when awarded upon ordering a new trial, would be in effect saying that, at least in *some cases*, "*its provisions shall apply to appeals in cases other than those mentioned in section 349.*" So, too, it is provided that, when a judgment upon appeal is affirmed in part and reversed in part, the costs shall be in the discretion of the court. This provision also must become inoperative, so far as it relates to appeals in the Supreme Court, if the application of the 6th subdivision of the 307th section is to be controlled by the last clause. In short, if this effect be given to that clause, it renders the provisions of the 306th section, so far as they relate to appeals in the Supreme Court, wholly ineffectual. I cannot believe that the Legislature ever so intended.

But suppose, for the sake of harmonizing and giving effect to all the provisions we find upon the subject, we allow the 306th section so far to limit the operation of the 6th subdivision of the 307th section as to leave that subdivision applicable to the particular cases mentioned in the 306th section, the difficulty will not be diminished. The inconsistency will still remain of allowing costs upon a partial reversal, when none could have been recovered if the reversal had been entire. If this construction be given to these provisions, a party appealing would rarely prefer to have a complete reversal. He would choose to have enough of the judgment affirmed to enable the court to exercise its discretion and give him costs. In that case, too, no costs would ever be recovered against the party appealing, when the judgment is affirmed. Such inconsistencies, not to say absurdities, never were intended by the Legislature.

But again: suppose we allow the last clause of the 6th subdivision to operate upon the preceding provision in the same subdivision, in the full literal sense of its terms, let us next inquire what would be the practical operation of the provision thus qualified and restricted. We have seen that it could not operate upon an appeal from a judgment rendered in an

inferior court by a single judge. Upon what, then, could it operate? Nothing, I apprehend, unless it be the cases mentioned in section 849. Suppose it to operate in fact upon that class of cases. The absurd consequences which would follow from such a construction are too obvious to require illustration. A party would recover costs upon an appeal from an order affecting in the slightest degree the merits of the action, when no costs could be given upon an appeal from a judgment involving the whole merits of the controversy. Costs would be awarded, and liberally too, upon an appeal from an order affecting a mere provisional remedy, when none would be provided upon an appeal involving a final determination of the rights of the parties. But would the provision have even this effect? I think not. The title of the code in which this provision is found, commences with abolishing the fee bill then existing, and declaring that certain allowances, to be termed costs, shall be made, by way of indemnity, to the *prevailing party, upon the judgment*. The 304th section declares that in certain actions, including nearly, if not all the actions which, under the former practice, would have been actions at law, as well as some equitable actions, the plaintiff, upon a recovery, that is as I understand it, if he be the prevailing party upon the judgment, shall be allowed costs of course, or as a matter of right. The next section, the 305th, declares that the defendant, if he prevails in the same actions, shall be entitled to costs. The 306th section declares in what cases costs shall be awarded in the discretion of the court. These three sections are evidently intended to regulate and determine the rights of the parties, in respect to costs in every action. They relate exclusively to costs upon a *recovery*. They determine the right of the prevailing party to costs *upon the judgment*. No allusion is made in either of these sections to costs to be awarded upon a motion. Having thus declared when and to whom costs shall or may be awarded in rendering judgment upon a recovery in the action, the 307th section proceeds to declare what shall constitute the costs so to be awarded, and the 311th section directs the manner in which the costs, *as above provided* shall be inserted *in the entry of judgment*. All these provisions clearly relate to the costs which the prevailing party is to recover *as a part of his judgment*, as distinguished from the costs which may be allowed upon a motion, and for which provision is subsequently made. That the Legislature understood these sections as exclusively applicable to costs upon judgments, is further evident from the fact that in one instance it was thought proper to extend their provisions to another case. By the 318th section it is provided that when the decision of a court of inferior jurisdiction in a *special proceeding*

shall be brought before the Supreme Court for review, such proceeding shall, *for the purposes of costs*, be deemed *an action at issue*, on a question of law from the time the same shall be brought into the Supreme Court. It is unnecessary here to inquire whether any provision has been made for bringing such a proceeding into the Supreme Court for review. But assuming that it may be brought there, the Legislature, regarding the provisions they had made for costs as applicable to such a case, adopt the section referred to with a view to bring the case within those provisions. So that now, such a proceeding, when brought into the Supreme Court, being, for the purposes of costs, regarded as an action at issue upon a question of law, the prevailing party would be entitled to costs under the 307th section.

The conclusion to which I have been led by this examination, is that, whatever else the Legislature intended, *it did not intend* that the provisions of the 6th subdivision of the 307th section should be applicable to an order made by a single judge upon motion. This being so, it follows, if its provisions are not applicable to other appeals, that this subdivision is wholly inoperative—the restricting clause destroys its whole effect.

It is one of the established rules, governing the construction of statutes, that if possible, effect should be given to each part, so that, if it can be prevented, no clause, sentence, or even word may be regarded as superfluous, void, or insignificant. It is also a rule, equally well-established, that such a construction ought to be put upon a statute as will best give effect to the intention of the lawgiver. It was said by THOMPSON, Ch. J. in *The People v. the Utica Insurance Co.* 15 Johnson, 389, that “a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers.” I have already shown conclusively, I think, that the clause which is the occasion of this examination, is not only opposed to the general scope and object of the provisions of the code relating to costs, but it is also absolutely incompatible with several other provisions. And more than this, that if this clause, in the fair import of its terms, is to prevail, it is itself destructive of the entire subdivision in which it is found. Under these circumstances I must, under the guidance of the rules which regulate in the exposition of statutes, reject the clause altogether as totally and irreconcilably repugnant to the manifest intention of the Legislature as expressed in every other part of the same act relating to the same subject.

It was said by Lord Coke, that great questions had often arisen “upon acts of parliament, overladen with provisos, and additions and many times on a sudden penned or corrected, by men of none, or very little judgment

in law." It needs but the perusal of the code to see that this ground of complaint was not confined to the days of Lord Coke. A signal instance of the incautious haste with which "provisos and additions" are sometimes penned and adopted, is presented in the very title which is the subject of this review. The 322d section declares that upon the settlement of any action mentioned in section 304, no greater sum shall be demanded from the defendant as costs, *than at the rates prescribed by that section*. Taken as it stands, the section is utterly nugatory and unmeaning. It does not express the intention of the Legislature or the person who drew it. It was undoubtedly intended to refer for the measure of costs in the cases specified in that section to the 307th section, and it will probably be so construed. But, inadvertently, the framers of that section instead of using at the end, the words "by the 307th section," said "by that section," and the Legislature, without perceiving the mistake, adopted it. So, if I could be allowed to go out of the act itself, I might refer to the history of the clause I have been constrained to reject, as it is generally understood, to show that it was inserted as an amendment, *ex cautela*, for the very purpose of preventing the provision, to which it was intended it should apply, from being, by construction, made applicable to appeals in cases mentioned in section 349, and by some mistake in preparing or transcribing the amendment, the word "not" was inserted instead of "only."

I shall, therefore, hold in this case that upon the affirmance of the judgment upon appeal, the plaintiff became entitled to the costs prescribed by the 6th subdivision of the 307th section of the code. But the defendants are entitled to have \$10 stricken out of the judgment. After the plaintiff had noticed the cause for argument at the Albany general term, to be held on the first Monday of March, the defendants noticed it for the Saratoga general term, to be held on the same day. I think the plaintiff is not entitled to the costs prescribed by the 8th subdivision of the 307th section for *each* of those terms. The cause was not *necessarily* or even properly on the Saratoga calendar. Neither party should have costs upon this motion.



## SUPREME COURT.

JAMES POWERS and JOHN KIERSTED, Junior, vs. NICHOLAS ELMENDORF.

THE SAME vs. WILHELMUS ELMENDORF and JOHN W. ELMENDORF.

Under the 388th section of the amended code, the court have the *power* in any case, where either party has in his possession or power, papers, books or documents containing evidence *bearing upon the merits of the action*, to compel such party to exhibit such books, papers and documents to the adverse party, when, in the exercise of its discretion, it should deem such discovery proper.

Such discovery may be had, where one party desires to ascertain what documentary evidence his adversary holds *upon which he is relying to sustain himself upon the trial*. Ample discretionary power is vested in the court to enforce obedience to any order it may make for such discovery.

*Albany Special Term, July, 1849.* This was an application on behalf of the plaintiffs to require the defendants to give them an inspection and copy of certain papers and documents relating to their defence. The petition states that both actions are brought to recover certain lands in the county of Ulster—that the defendant Nicholas Elmendorf in his own right and the defendants in the second action, as the tenants and in right of Nicholas Elmendorf, claim that one William H. Elmendorf, at the time of his death, was seized in fee of and well entitled to, the lands sought to be recovered in both actions, and that the defendant Nicholas Elmendorf inherited the lands as his heir-at-law. The petition further states that “the discovery and production of the title papers and deeds vesting or supposed to vest title to said premises in the said William H. Elmendorf, are necessary to enable the plaintiffs to reply properly to the answers and to prepare for trial.”

The defendants, in opposition to the motion, produced their own affidavit and the affidavit of their attorneys, all swearing that they had not had in their possession or control, since the commencement of these actions, *any of the conveyances or title deeds* referred to in the plaintiffs' petition, except a certain deed described in the affidavits.

H. HOGEBROOM, *for plaintiffs.*

M. SCHOONMAKER, *for defendants.*

HARRIS, Justice.—The decision of the question before me involves the practical application of that part of the 388th section of the code which

provides that "the court before which an action is pending, or a judge or justice thereof, may, in their discretion, and upon due notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy of any books, papers and documents in his possession, or under his control, containing evidence relating to the merits of the action, or the defence therein. By the Revised Statutes, a similar power was conferred upon the Supreme Court, (2 R. S. 199, § 21,) but by the succeeding section it is declared that in the exercise of this power the court shall be governed by the principles and practice of the Court of Chancery, in compelling discovery. Under this restriction, it has been understood that a party could only obtain a discovery of such papers and documents in the possession or control of his adversary, as might furnish evidence in his own behalf upon the trial. (*Meekings v. Cromwell*, 1 Sand. S. C. Rep. 698.) In Cooper's Eq. Pl. 58, the rule in chancery is stated to be that a plaintiff in a bill of discovery "*shall only have discovery of what is necessary for his own title, as of deeds he claims under, and not pry into that of the defendant.*" If this rule is to be applied to the construction of the provision of the code already cited, it is obvious that the plaintiffs in these actions are not entitled to the discovery they seek. They do not pretend that the defendants have within their power, any papers or documents which they wish to use in support of their title to the premises. On the contrary, they avow it to be their purpose, in asking for this discovery, to ascertain upon what evidence the defendants expect to protect their possession.

The language of the code, it is to be observed, is substantially the same as that contained in the 21st section of the Revised Statutes, referred to. In its terms it is broad enough to authorize an order for the discovery of any books, papers or documents, which may contain any evidence pertinent to the merits of the action, on either side. The restriction contained in the 22d section of the Revised Statutes is not found in the code. From the absence of this restriction, it might be fairly inferred that the Legislature did not intend that the court should hereafter be governed by the principles and practice of the Court of Chancery in compelling the discovery. But that this is so—that it was intended that the court should have the power, in any case where either party has in his possession or power, papers or documents containing evidence bearing upon the merits of the action, to compel such party to exhibit such papers and documents to the adverse party, when, in the exercise of its discretion, it should deem such discovery proper, is, I think, made certain by reference to the means prescribed for enforcing obedience to the order for such discovery. By the Revised Stat-

utes, the plaintiff, if he disobeyed the order, might be non-suited, and the defendant might be debarred from any particular defence to which the discovery sought related, or his plea or notice might be stricken out. To these remedies the court was expressly confined. (2 R. S. 200, § 26.) They all evidently contemplate a discovery sought for the purpose of using the evidence to be obtained against the party who is required to furnish it. None of them are adapted to a case where a party seeks a discovery of evidence upon which his adversary relies to establish his side of the issue. But it is not so in the code. There it is provided that "if compliance with the order be refused, the court, on motion, may exclude the paper from being given in evidence." But of what avail would this provision be, if a discovery could only be had of papers and documents, which the party asking for the discovery wished to use as evidence? It certainly would be no punishment to say that, upon his refusing to make the discovery, his adversary, who sought thus to obtain evidence beneficial to himself, should be deprived of such advantage. It cannot be doubted that the framers of the code intended to confer upon the court the power to require a party to disclose to his adversary any documentary evidence within his power upon which he expects to rely upon the trial. Indeed, as the code was originally reported by the commissioner, no other remedy was provided for a refusal to comply with an order for discovery. The Legislature, foreseeing that such a remedy would not be adapted to cases in which the party seeking the discovery wished to use the evidence in his own behalf, also authorized the court to punish the party refusing to make the discovery—so that, as this section of the code was finally amended and adopted, ample discretionary power is vested in the court to enforce obedience to any order it may make for the discovery of papers and documents by appropriate punishment for disobedience. In a case like that now before me, where one party desires to ascertain what documentary evidence his adversary holds upon which he is relying to sustain himself upon the trial, it is enough if he refuses to make the discovery, to say that he shall not be permitted to avail himself of such documentary evidence. On the other hand, when the party, asking for the discovery, supposes the evidence will be beneficial to himself, the court must devise some other method of punishing the party who refuses to obey its order, adapted to the circumstances of the particular case.

The power thus conferred upon the court, is, in my judgment, better adapted to attain the ends of justice, than the more restricted power it before possessed. I can see no good reason why a party should be permitted to withhold from the knowledge of his adversary documentary evidence

affecting the merits of the controversy, only to surprise him by its production at the trial. Unless for some satisfactory reason to be made apparent to the court, each party ought to be required, when it is desired, to disclose to the other any books, papers and documents within his power, which may contain evidence pertinent to the issue to be tried. If the evidence thus disclosed should be conclusive upon the issue, the parties may be saved the expense of a trial—and if not, they will come to the trial upon equal terms, each prepared, so far as the evidence within his reach will enable him to do so, to maintain his side of the controversy. This I believe to have been the intention of the Legislature, and this I regard as the true construction of their enactment on this subject. I shall therefore direct that, within ten days after service of a copy of the order, the defendants deliver to the plaintiffs' attorneys copies of all papers and documents in their possession or under their control, upon which they will rely at the trial of these actions, as containing evidence to sustain the allegation in their answers that William H. Elmendorf died seized in fee and well entitled to the premises sought to be recovered, and that the plaintiffs have ten days, after the time for delivering such copies shall expire, to reply to the defendants' answers. The order will further direct that, in case, after receiving such copies, the plaintiffs shall desire an inspection of the original papers and documents, the defendants shall give them such inspection at the office of their attorneys, upon five days' notice of the time when they will attend for that purpose. As I understand the statute, this is all the order, made in the first instance, should contain. Upon the failure of the defendants to comply with the order, the plaintiffs may apply for a further order that any papers and documents, of which, by the terms of the order, copies ought to have been furnished, shall be excluded as evidence upon the trial or for such other appropriate order as the circumstances of the case may justify. The first order may be made by a judge or justice out of court, but the second order can only be made by the court upon evidence of a refusal to comply with the first.

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### SUPREME COURT.

THE CAMDEN BANK vs. CHARLES M. RODGERS and LLOYD L. BRITTON.

Every action must now be prosecuted by the *real party in interest*.

Where the plaintiffs—a bank—sued on a draft payable to the order of W. B. S., their

cashier, and the complaint alleged that it was delivered to the said W. B. S., cashier "for the said Bank," held, on demurrer to the complaint, that the action was well brought in the name of the bank.

*Albany Special Term, July, 1849.*—This was a motion for judgment on the ground of the frivolousness of the demurrer to the complaint in this action, under the 247th section of the code. The action is brought upon a draft dated April 5, 1849, payable ten days after date and drawn by the defendants upon the Commercial Bank of Albany, and payable "to the order of W. B. Storm, Cashier," for \$300. The complaint, after setting forth a copy of the draft, states, that the defendants "delivered the said draft to W. B. Storm, cashier of the said Camden Bank, for the said bank," and that "the said draft is now held and owned by the said plaintiffs, and still remains due to them from the defendants." The defendants demurred to the complaint, alleging for cause that it does not state facts sufficient to constitute a cause of action.

H. H. MARTIN, *for plaintiff.*

J. G. BRITTON, *for defendants.*

HARRIS, Justice.—A declaration at common law, containing merely the same averments found in this complaint would have been bad. The draft is payable to the order of W. B. Storm, cashier, and is only transferable by endorsement. Even though it had appeared that the payee of the draft was the cashier of the plaintiffs, and had received the draft as such financial agent, it would not have been sufficient to sustain the pleading. By the custom of merchants, by force of which alone the transferee of a bill could maintain an action in his own name, the transfer could only be made by writing on the bill, and this must be alleged in the declaration. But by the code the rule which before prevailed in equity is adopted, and now "*every action must be prosecuted in the name of the real party in interest.*" The assignee of a demand, whether negotiable or not, must be the plaintiff in the action. How, then, does the case stand? The draft is payable to the order of the plaintiffs' cashier. It was delivered to him *for the bank*. The bank are the holders and the owners of the draft. These are the averments of the complaint, and taking them to be true as we do upon demurrer, who but the plaintiffs has such an interest in the draft as would entitle him to maintain an action? The payee of the draft, instead of being "*the real party in interest*" has no interest at all in the draft. The plaintiff is entitled to judgment, but the defendants may have leave to answer the complaint within ten days after service of a copy of the rule to be entered upon this decision, upon payment of ten dollars for the costs of this motion.

## SUPREME COURT.

JOHN N. WILLARD agt. GEORGE R. ANDREWS and others.

*Ten per cent.* was allowed on the amount of the verdict at the circuit in a suit upon a promissory note, where the defendant put in a false answer, by which the plaintiff was thrown over a circuit.

*Rensselaer Circuit, June, 1849.*—On the 18th September, 1848, the defendant made his promissory note in writing to Wilson and Calkins for the sum of three hundred dollars, payable at the Troy City Bank, two months after date, and Wilson and Calkins on the same day endorsed and transferred the said note to the plaintiff, who then and there became the owner of it. When the note became due it was protested for non-payment, and an action was brought against the maker and endorsers. The endorsers suffered a default, but the defendant Andrews put in an answer, denying the making of the note and of the demand thereof, and also alleging that it was without consideration. The answer was verified under the old code by the defendant's attorney. The cause being at issue was noticed for trial at the April Rensselaer circuit, but was not reached on the calendar. It was again noticed for trial and inquest at the late June circuit in Rensselaer county, and an inquest was taken by default for the amount of the note. The defendants made no defence. A motion is now made for an order allowing to the plaintiff ten per cent. on the recovery (\$811.45) under the § 808 of the code, on the ground that the defence was unreasonably or unfairly conducted.

C. S. LESTER, *for the motion.*

C. W. ROOT, *contra*, read an affidavit of the defendant Andrews, that the defence was put in, in good faith—that the note was given to Wilson and Calkins upon false representations, and that there was not more than one hundred dollars due from him to them when it was given—that he had reason to expect he could prove that the suit was brought by the plaintiff for the benefit of Wilson and Calkins, and afterwards learned that he could not prove it.

WILLARD, Justice.—The defendant's answer was false. He does not now pretend that he did not give the note; nor does the answer set up the pretext that the suit was brought for the benefit of Wilson and Calkins, the payees and endorsers. The note having been transferred to the plaintiff before it was due, could not have been impeached by the defendant Andrews, on the ground of a want of consideration. It is quite clear that the defence was merely for delay and without the shadow

of any legal excuse. It was therefore "unfairly and unreasonably conducted," within the meaning of the code, § 308, as it unjustly threw the plaintiff over a circuit. I shall therefore direct that an allowance of ten per cent. on the recovery be made to the plaintiff and be inserted in the record by the clerk.

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### SUPREME COURT.

JOSEPH HOLMES agt. MOSES ST. JOHN, WILLARD BLUNT and  
FRANKLIN BLUNT.

*Costs* must now be regulated and allowed in pursuance of the amended code, even though the suit was commenced prior thereto and was pending when it took effect. There is no provision, saving from its operation in that respect, suits pending.

In cases of assault and battery, no more costs than damages can be recovered, (§ 304 amended code, 4th sub.) if the recovery is less than \$50.

*Catawagus Circuit and Special Term, July, 1849.*—The action in this case was for an assault and battery, and was commenced after the act entitled, "an act to simplify and abridge the practice, pleadings and proceedings of the courts of this state," passed April 12, 1848, took effect, and before the amendment of that act on the 11th of April, 1849. Two of the defendants appeared and answered, and the cause was tried at the present circuit, when the plaintiff recovered a verdict of six cents damages. The plaintiff claims that he is entitled to judgment upon his verdict, together with the full costs of the court. The defendant insists that the plaintiff is entitled to recover no more costs than damages.

WELLES, Justice.—The 4th subdivision of § 304 of the amended code limits the plaintiff's recovery of costs to the amount of his damages. But it is insisted that, as the action was commenced previous to the passage of the amendment, and under the original act, which allowed full costs in such cases, the plaintiff's right to costs must be governed by the law as it existed at the time the action was commenced. The code, as amended, is the only law in existence under which the plaintiff can ask for costs at all. Costs were not given at common law in any case, and the subject was always regulated by statute. There is no provision of the amended code, saving from the operation of the section referred to, cases pending at the time of its adoption. It follows, therefore, that the plaintiff is entitled to no more costs than the amount of his verdict. The clerk will enter judgment accordingly.

## SUPREME COURT.

THOMAS TAYLOR and wife agt. ROBERT GARDNER.

In cases of libel, no more costs than damages can be recovered, if the recovery is less than \$50. (§ 304 amended code, 4th sub.) But, in every such case, the prevailing party is entitled, besides his costs, to *necessary disbursements and fees of officers allowed by law*. (This case decides the same question as the next preceding, with the additional point that *all necessary disbursements* may be allowed.)

*Albany Special Term, August 7, 1849.*—This was an action for libel tried at the Schoharie circuit in June, 1849. The jury found a verdict of *six cents* in favor of the plaintiffs. A motion was made, on their behalf, for leave to enter in the judgment full costs of the action. The defendant insisted that the plaintiffs were only entitled to *six cents* costs.

J. H. RAMSAY, *for plaintiffs*.

D. LAWYER, *for defendant*.

HARRIS, Justice.—This being an action embraced in the 4th subdivision of the 304th section of the code, the plaintiffs, having recovered in the action, became entitled to costs, of course. They should have applied to the clerk, in the manner prescribed by the 311th section, to determine the amount of such costs, and, if either party should be dissatisfied with his decision, it would be proper to apply to the court, upon motion, to correct his error. This motion is, therefore, premature. But it may save the parties another motion to consider now the question they have presented.

It is true that, as the law stood when this suit was brought, the plaintiffs would have been entitled to *full costs*. But the right to costs accrues only upon the termination of the suit, unless otherwise specially provided. The law, therefore, which was in force when the plaintiffs recovered judgment in the action, must decide their rights upon the question of costs. (*Supervisors of Onondaga v. Briggs*, 3 Denio, 173.) By the amended code, it is provided that the plaintiff, in an action for libel, if he recover less than fifty dollars, shall recover no more costs than damages. It follows, then, that the plaintiffs are only entitled to *six cents* costs. But the 311th section directs the clerk, upon entering judgment to insert the *sum of the charges for costs* "*as above provided*," referring to the preceding sections, which prescribe the cases in which costs are recoverable, and the rates of such costs, and also "*the necessary disbursements and fees of officers allowed by law*." Such disbursements and fees



are evidently not embraced in the provision of the 4th subdivision of the 304th section, which limits the plaintiffs to six cents costs. The plaintiffs are therefore entitled, besides their six cents costs, to necessary disbursements and fees of officers allowed by law. Motion denied.

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### SUPREME COURT.

ANDREW WHITE, Receiver, &c. of the Canal Bank of Albany, agt.  
JAMES KIDD.

Irrelevant or redundant matter in a pleading must be such as *cannot be reached by demurrer*, and also *prejudicial* to the adverse party, to authorize it to be stricken out under the 160th section of the code,

*Albany Special Term, August 7, 1849.*—This was a motion to strike out a part of the defendant's answer, upon the ground that it is irrelevant and redundant. The action is brought upon two checks upon the Mechanics' and Farmers' Bank, alleged to have been made and delivered by the defendant to the Canal Bank, one on the 5th of October, 1844, and the other on the 13th of October, 1845. The complaint states that the checks were held and owned by the Canal Bank, until the plaintiff was appointed receiver of its effects on the 17th of July, 1848, and that on the 15th of August, 1848, the checks were presented to the bank upon which they were drawn, and payment demanded and refused.

Among other grounds of defence stated in the answer, the defendant states, in substance, that, in October, 1845, the defendant sold and conveyed to Theodore Olcott, the cashier of the Canal Bank, certain real estate, in consideration of which he agreed to pay the checks—that he then was, and continued to be solvent and in good credit, until the first of January, 1848, prior to which time, the amount of the checks might have been collected of him at any time—that since that time he has become insolvent, and, by reason of the omission of the Canal Bank to present the checks for payment, the defendant "has suffered actual loss, and been otherwise damaged," and he insists that he is thereby released from his liability to pay the checks. This part of the answer the plaintiff alleges to be irrelevant and redundant.

H. H. MARTIN, *for plaintiff.*

J. K. PORTER, *for defendant.*

HARRIS, Justice.—Three modes are provided in the code by which a

plaintiff may get rid of matters improperly inserted by the defendant in his answer. If it be clear that the answer contains no defence to the action, the plaintiff, under the 247th section, may, at once, apply for judgment, on the ground that the answer is frivolous. If several defences are set up in the answer, of which some do, and others do not, constitute a good defence, the plaintiff may, under the 153d section, put in issue the truth of such defences as he deems sufficient if sustained by proof, and, by demurrer, deny the sufficiency of the other defences, even if true. Again, if, in stating a defence, irrelevant or redundant matter be inserted with that which is material, so that it can not be reached by a demurrer, the 160th section provides that it may be stricken out, upon motion; when the plaintiff would be prejudiced by suffering it to remain in the answer. This is the chief, if not the only object of the authority given in the first clause of the section last mentioned. I do not say that a case might not be presented where several defences might be set up, one of which should be so utterly frivolous as to justify an application to strike it out, without putting the plaintiff to his demurrer. But, ordinarily, when one good ground of defence is contained in the answer, so that the plaintiff can not apply for judgment on the ground that the whole answer is frivolous, I think the true mode of determining whether any particular defence is sufficient should be by the demurrer. The true office of the motion authorized by the 160th section, is to reach matter improperly inserted in a pleading and which can not be reached by a demurrer. Without deciding, therefore, whether the allegations in the answer sought to be stricken out, do or do not constitute a defence, I think the motion should be denied. The plaintiff may have ten days further time to demur or reply, if he shall elect so to do. Neither party should have costs upon this motion.

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#### SUPREME COURT.

PETER HYND, Junior, agt. WICKHAM GRISWOLD and WICKHAM H. GRISWOLD.

The 160th section of the code does not authorize an application upon motion to strike out every *irrelevant or redundant* expression or clause in a pleading; effect must be given to the word "*aggrieved*," in that section. A party must be *aggrieved or prejudiced* thereby. (See *White, Receiver, &c. v. Kidd*, *ante*, page 68.)

*It seems*, that it is proper for a defendant to state in his answer any facts which it would be material for him to prove on the trial, though such facts may not constitute a complete defence to the action.

*Albany Special Term, August 7, 1849.*—This action was brought to recover damages for fraudulently concealing, upon the sale of a span of horses by the defendants to the plaintiff, their vicious propensities. The defendants deny that the horses were vicious, or if they were, that they fraudulently concealed that fact from the plaintiff, and then state that they are ready and willing to receive back the horses and return the money paid for them, and on several occasions before the commencement of this suit had offered to do so, and that they had also offered to pay the plaintiff for all his trouble and time in making the purchase and otherwise, but the plaintiff had wholly refused to accede to their offer. These statements were alleged by the plaintiff to be irrelevant and redundant and a motion was made to strike them out on that account.

J. H. RAMSAY, *for plaintiff.*

J. K. PORTER *for defendants.*

HARRIS, Justice.—I am inclined to think it proper for a defendant to state in his answer any facts which it would be material for him to prove on the trial, though such facts may not constitute a complete defence to the action. Anything which it would be material to prove upon the trial, ought not, I think, to be deemed irrelevant when stated in the answer. The plaintiff ought not to complain that the defendant has apprized him of facts upon which he intends to rely in mitigation of damages, if not in defence, upon the trial.

But conceding the matter to be *irrelevant* or redundant it does not necessarily follow that the motion to strike it out should be granted. I apprehend it was not the intention of the Legislature in adopting the 160th section of the code to authorize an application upon motion, to strike out every irrelevant or redundant expression or clause which might be found in a pleading. On the contrary, effect must be given to the word "*aggrieved*," as used in that section. The matter must not only be irrelevant or redundant, but some party must be aggrieved or prejudiced thereby. Such a person only is authorized to make the motion. It is not pretended in this case that the plaintiff will be in any respect prejudiced, by allowing the irrelevant matter, if indeed it be irrelevant, to remain in the answer. The motion must therefore be denied, but as a new question is presented by the motion, it should be denied without costs.

## SUPREME COURT.

WILLIAM H. SACKETT agt. JOHN P. BALL.

In determining whether or not an allowance should be made under the provisions of the 308th section of the code, (ten per cent.) Each case must necessarily depend upon its own peculiar features and circumstances. No rule can well be established to aid the court in its discretion.

Now, such applications must be made before the justice who tried the cause, or rendered judgment therein. (See New Rule 86.)

Where in a cause, in which it was evident that the litigation had been severe and protracted, although no serious or difficult questions of law or of fact were involved, the allowance was denied, for the reason that another cause involving the same questions was tried at the same time, and it seemed that both might have been joined in one action and saved the defendant one bill of costs.

*Albany Special Term, August 7, 1849.*—This was an application for an additional allowance for costs under the 308th section of the amended code. The action was for taking a quantity of flax. It was tried by a referee. The plaintiff, in his summons and complaint, claimed to recover \$500. The referee reported in his favor to the amount of \$424. The affidavit upon which the motion is founded states that about *eight days* were occupied in taking the testimony and several days more in the argument of a motion for a non-suit, and when that had been denied, in arguing the cause upon the evidence. The affidavit further states that an *extraordinary* amount of evidence was taken, and that, on account of the nature of the case and the “vigor and spirit” of the defence, the trial was *extraordinarily* expensive—that the plaintiff’s expenses, over and above what is taxable, amount to at least \$800. It also appeared that another suit, involving substantially the same questions, and which had been brought before the code took effect, was tried at the same time, by the same referee; and that in the latter suit the plaintiff also recovered.

G. STOW, *for plaintiff.*

R. W. PECKHAM, *for defendant.*

HARRIS, Justice.—No guide has been furnished by the Legislature by which to determine what are, and what are not “difficult or extraordinary cases.” From the very nature of the question, it seems impossible to establish a rule, which will aid the court in determining whether or not an allowance should be made, under the provisions of the 308th section. Each case must, I think necessarily, depend upon its own peculiar features and circumstances—and, what is perhaps more to be regretted, upon the peculiar views and the uncontrolled discretion of the particular judge

before whom the application may happen to be made. Of course, allowance, under this provision of the statute, must be uncertain and fluctuating. After the trial of every litigated case, it may be expected that it is to be reviewed upon a motion by the prevailing party for the allowance of a per centage. Such, however, is the will of the Legislature, and it is the duty of the court to execute that will as best they can. The evil to which I have ventured to allude has, I think, been somewhat mitigated, by the rule just adopted, requiring such applications to be made before the judge who tried the cause or rendered judgment therein. The knowledge he must have acquired of the nature and merits of the controversy, will essentially aid him in making a just determination upon the question of costs; but even that rule does not reach a case like that before me, where a judgment has been rendered upon a report of a referee.

Generally, I am inclined to think, the court, in determining such questions, will be influenced more by the difficulty and intricacy of the questions involved than the time occupied in the litigation—and yet I think it may be inferred, from the new provisions added to the section in the amended code, that the Legislature contemplated a reference to the number and length of the proceedings in an action, as well as the intrinsic difficulty of the questions, in determining upon the allowance. Otherwise I cannot see why special provision should be made for an allowance in cases of partition, foreclosure, &c. So that, after all, I am obliged to leave the question where I commenced with it, each case to be determined by its own peculiar circumstances and the peculiar views of the judge, before whom the application is made, upon the subject of costs.

In this case, the litigation was evidently severe and the trial protracted. It does not appear, however, to have involved any questions of law or of fact, of very serious difficulty. I should infer, from the papers before me, that it was the ordinary question, as to which of the parties had the better title to the property. Two causes, involving the same questions, were tried together. The plaintiff therefore recovers two bills of costs when it would seem that both causes of action might properly have been embraced in the same suit. If there had been but one action I should have felt inclined, from what appears in this case, to make the allowance asked for. But the defendant is already chargeable with two bills of costs for trying substantially the same questions. I think this is enough. The motion is therefore denied, but without costs.

## SUPREME COURT.

JOHN F. NORBURY et al. agt. CASTLE SEELEY and others.

In rendering judgment under section 274 of the code (which gives authority to determine the rights between the plaintiffs or defendants, as between themselves,) the provision therein shall be confined to parties *actually litigating* before the court.

Hence, where one of several defendants, as surety, applied after the plaintiff had obtained judgment against all the defendants, without answer, to have execution against the principals, in case he had the debt to pay, *held*, that it was not proper to determine the rights of the defendants upon mere motion, and especially without notice.

*Albany Special Term, August 7, 1849.*—This was an action upon a promissory note signed by Castle Seeley and Garret Tollee as principals, and Nathan Clark, Jr. as surety. The defendants were all served with a summons in the usual form, stating that if they should fail to answer the complaint, &c., the plaintiffs would take judgment for the amount of the note, with interest. None of the defendants having answered, the plaintiffs are entitled to judgment. A motion was made on behalf of the defendant Clark, upon an affidavit stating that he is a mere surety for the other defendants, upon the note; that provision may be made in the judgment for an execution in his favor, against the other defendants, in case he is obliged to pay the judgment.

ALONZO GREENE, *for the defendant Clark.*

HARRIS, Justice.—By the 274th section of the code, it is provided that the judgment to be rendered in an action may determine, not merely the rights between the plaintiffs and defendants, but also the ultimate rights between the plaintiffs or the defendants as among themselves. It is supposed by the counsel who made this motion, that this provision confers upon the court the power, when rendering judgment for the plaintiffs upon the note, to proceed further, and render judgment, contingently, in favor of the surety against his principals. Perhaps this is so. The language of the section referred to seems to be broad enough to authorize it; and yet it would seem, from the language of the next section, that it was intended that in case of failure to answer, no judgment should be given beyond that asked for in the complaint. It is true that this restriction in the 275th section is, in terms, confined "*to the relief granted to the plaintiff.*" Yet there is equal reason for applying the same restriction to the relief sought by one defendant against another. The defendants, who are alleged to be the principal debtors, were in effect apprized by the summons served on

them, that if they failed to answer, judgment would be rendered against them for the amount due upon the note. This was the relief demanded in the complaint. They were not, and have not been, apprized that any relief would be sought against them by their co-defendant. I am not prepared to say that it would not be proper to make some provision, in a judgment like that contemplated by this motion, upon notice to all the parties to be affected by it. But, even then, it may be doubted whether the rights of the defendants as between themselves ought to be determined upon mere motion. I regard the provision upon which this application is founded as judicious and valuable; but I am inclined to think it safer, and more in accordance with the object for which it was inserted in the code, to confine its operation to parties actually litigating before the court. This motion must therefore be denied.

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### SUPREME COURT.

JAMES SAVAGE and PATRICK H. COWEN agt. JAMES H. DARROW.

Costs upon an appeal under the 349th section of the amended code, must be governed by the 315th section. (*The court decided in Livingston agt. Miller, ante, page 42, and William agt. Allen, ante, page 54, that the 6th sub. of sec. 307 is repugnant to the other provisions in the code on the same subject, and must be rejected.*) Such an appeal is within the definition of a motion contained in the 401st section. The costs are therefore in the discretion of the court. Where none is awarded upon the decision of the appeal, none can be allowed on the appeal.

*Albany Special Term, August 7, 1849.*—A motion having been made in this cause before Mr. Justice Willard, to vacate an order holding the defendant to bail, and the same having been denied, the defendant appealed from the order denying the motion to the general term. Upon the appeal, the decision of the justice was reversed, and the order to hold to bail vacated. Upon an affidavit showing these facts, the defendant moved that the plaintiff be ordered to pay to the defendant \$45 for his costs upon the appeal, and that he be at liberty to issue a precept in the nature of an execution, to collect such costs.

A. BOCKES, *for defendant.*

R. W. PECKHAM, *for plaintiffs.*

HARRIS, Justice.—The motion for costs is founded upon the 6th subdivision of the 307th section of the code. It is supposed by the defend-

ant's counsel that the costs specified in that subdivision are recoverable upon appeals in the cases mentioned in section 349, and in such cases only. If this were so, I do not perceive why the defendant would not be entitled to the costs he demands. But I have just decided in *Wilson* agt. *Allen*, (*ante*, page 54,) that the clause in the 6th subdivision, upon which the defendant relies, is repugnant to the other provisions in the code relating to the same subject, and must be rejected.

The only allowance for costs provided by the code upon an appeal under the 349th section is, I apprehend, under the 315th section. In *Van Wyck* agt. *Alliger*, 3 Howard's Pr. R. 292, it was held that the *re-hearing* of a motion was, within the meaning of the 270th section of the code, corresponding with the 315th section of the amended code, a motion; and the opinion was intimated that the same construction would be given upon appeal. I think such an appeal is within the definition of a motion contained in the 401st section. But the costs upon a motion are in the discretion of the court deciding the motion; and as none were awarded upon the decision of the appeal, none can be allowed. The motion is therefore denied, but without costs.

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### SUPREME COURT.

JESSE CONDE agt. NELSON G. SHEPARD and ELIZA ANN SHEPARD.

Where, in an action against husband and wife upon the foreclosure of mortgage executed by them, and also the accompanying bond to secure a part of the purchase-money for the premises conveyed to the wife in fee, subsequent to the act of April 7, 1848, (Sess. L. 1848, p. 307,) *held*, on demurrer to the complaint, that there was no misjoinder of parties, nor uniting of incompatible causes of action, although the wife was not liable on the bond in case of a deficiency on sale, &c. The bond was void as to the wife, but good as to the husband. She was a necessary party because the legal estate was in her, and he was a proper party because of his liability on the bond in case of a deficiency on sale, and both were the mortgagors.

*July 30th*, 1849.—The complaint is for the foreclosure of a mortgage made by the defendants on the 10th of May, 1848. It is alleged that the mortgage was executed by the defendants to secure a part of the consideration money due for the same premises that day sold and conveyed by the plaintiff to Eliza Ann Shepard, in fee. The defendants also united in a bond to the plaintiff, conditioned to pay the same sum.



The mortgage was duly acknowledged and recorded, and the requisite notice has been filed.

The defendants have demurred, severally, to the complaint. The causes assigned are, first, that the defendant Eliza Ann, being a *feme covert*, could not make a valid mortgage. 2d. The defendant Nelson G. Shepard was not a proper party to the mortgage, as he had no estate in the premises mortgaged, the land having been conveyed to the wife subsequent to the act of April 7, 1848, (L. of 1848, p. 307.) 3d. The wife could not make a valid bond or covenant. 4th. A cause of action on the bond against the husband, can not be united with the cause of action on the mortgage, to which the wife alone was a proper party.

W. T. ODELL moved for judgment under § 247, on the ground that the demurrer was frivolous.

J. W. CULVER, *contra*.

WILLARD, Justice.—The wife had a right to receive, in her own name, a deed of real estate, and to hold it without its being subject to the disposal of her husband, (L. of 1848, p. 308, § 3,) although the act of 1848 is silent with respect to her right to dispose of the same; yet I apprehend there is no doubt, that at common law she had the right, by uniting with her husband, to charge it with a mortgage, or to convey it away in fee. The better opinion seems to be that the husband, at common law, *must* unite with the wife in the conveyance. (2 Kent's Com. 152.) At any rate, his uniting with her cannot injure the conveyance. (1 R. S. 758, §§ 10 and 11; *Root v. Mix*, 17 Wend. 119; *Gillett v. Stanley*, 1 Hill, 121.)

The plaintiff, in a foreclosure suit before the code, might unite with the owner of the equity of redemption any person contingently liable for the debt, either as principal or surety. The rule formerly was, that the mortgagee might sue at law on the bond, and at the same time proceed in equity on the mortgage to foreclose it. (6 J. Ch. R. 77.) This was remedied by the Revised Statutes. (2 R. S. 191, §§ 151–154.) It is now expressly enacted, that if the mortgage debt be secured by the obligation or other evidence of debt of any other person besides the mortgagor, the complainant may make such person a party to the bill; and the court may decree payment of the balance of such debt remaining unsatisfied, after a sale of the mortgaged premises, as well against such other person as the mortgagor, and may enforce such decree as in other cases. (Id. § 154.) The bond in this case was void as to the wife, but good as to the husband. He was a necessary party, and there may be a decree over against him personally for the balance, if the whole cannot be collected by a sale of the mortgaged premises. The wife was a necessary party, because the

legal estate was in her, and she, together with her husband, were the mortgagors. The code has not changed this feature of the Revised Statutes. (See § 167 as to the joining of causes of action, and § 111, &c. &c., as to the parties to action.) The husband and wife were properly made defendants in this cause.

The demurrer in this case is not well taken—there is no misjoinder of parties, nor uniting of incompatible causes of action. Although the wife is not liable on the bond in case of a deficiency after the sale of the mortgaged premises, yet that is not an objection that can be raised in this demurrer.

The plaintiff is entitled to a judgment for the frivolousness of the demurrer. The points raised by it are all well settled, and have been so for about twenty years.

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## SUPREME COURT.

LEWIS L. SQUIRE agt. JOSEPH ELSWORTH and others.

In an action on contract for the recovery of money only, where there is a failure to answer, the clerk, in ascertaining the amount the plaintiff is entitled to recover (under section 246 of the code,) should make and file with the judgment roll, a *report* of his finding; analogous to the former practice of making and filing reports upon assessment of damages.

*New York Special Term, August, 1849.*—This is an action on contract for the recovery of money only, and the complaint is not sworn to. The question is, in what manner is plaintiff to obtain his judgment.

EDMONDS, Justice.—By section 246th of the amended code, the action not being on an instrument for the payment of money, but being on account for goods sold, the clerk is to ascertain the amount which the plaintiff is entitled to recover.

This, however, is to be done by the clerk in due form. It will not do for him merely to take the oral examination of the party or his witness, and then insert the amount in the judgment roll. He must make and file with the record a report of his finding, like the report on assessment under the former practice, so that the defendant may have some means of ascertaining what is the decision of the clerk in the premises, some means of correcting any errors into which he may fall. That report will be annexed to, and form a part of the record.

Any other practice than this will necessarily leave matters very much

at loose ends, and may deprive parties of the power of correcting errors in the assessment.

The clerk is substituted for the former sheriff's jury of inquiry ; and there is no reason why he should not, as was formerly the practice, make a report of his decision between the parties.

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### COURT OF APPEALS.

NANCY HARRIS, by her next friend, &c., Respondent, agt. RALPH CLARK and others, Ex'rs, &c., Appellants.

*An order, decree or judgment of the court, which contains a provision for a reference of certain matters, and that all further questions and directions be reserved until the coming in of the report of the referee, is not an appealable order, decree or judgment, under the code, (§11.) It is not the final order or judgment contemplated by the code.*

*July Term, 1849.*—The appeal in this cause was taken from a decree of the Supreme Court in Equity—Sixth Judicial District. The cause was brought to a hearing upon pleadings and proofs, and the decree entered November 21st, 1848. The question in the cause involves the construction of the will of Sydney Smith. The Supreme Court decided that the trusts in the will should be declared void *in toto*, and the property be allowed to descend, as in case of intestacy, with proper directions in the decree *for reference, and taking an account, &c.* The decree was accordingly so entered ; after declaring the general terms thereof, it was referred to Stephen Cambreleng, Esq., to take and state an account of all the personal estate of the said testator, &c., and how much was due to the complainant Nancy Harris, and the defendant Josiah C. Cady, respectively, as heirs-at-law of the said testator, &c. The last clause of the decree was entered in these words : " And it is further ordered, adjudged and decreed, that the taxable costs of all the parties to this suit be paid by the executors of said will, out of the personal estate of the said testator ; and that all further questions and directions be reserved until the coming in of the report of the said referee."

This cause was called upon the calendar of this court, July 21st, 1849.

Mr. CHARLES O'CONNOR, counsel for appellants, suggested to the court that, in his judgment, the order or decree appealed from, was not an appealable order, either under the code or otherwise ; although he admitted that the appeal must be taken under the code in this case.

Mr. BENJAMIN F. BUTLER, counsel for respondent, insisted that it was a judgment upon an actual determination made at a general term, and covered by § 11 of the code. That it was a *final order*, or such a *final judgment* as was contemplated by the code.

The court took the case under advisement, and on the 23d July it was decided. JEWETT, Ch. J., said the court had examined the question, and were of opinion that the order appealed from was not such a *final decree* or *final judgment* as was contemplated or intended by the code. The Legislature undoubtedly meant to prohibit an appeal from any order or judgment which was not *the final order or judgment*—the *last* one in the cause. That the language of the code was explicit and and well expressed to accomplish that object. In this case the decree appealed from states "*that all further questions and directions be reserved until the coming in of the report of the said referee.*" Of course it was not the *final order or judgment* of the Supreme Court.

Upon the suggestion of the respective counsel, that the case would be brought up in a proper shape, the court did not dismiss the appeal, but merely refused to hear the cause argued.

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## COURT OF APPEALS.

ELIZA A. CRAIN, Adm'r, &c., Respondent, agt. REUBEN ROWLEY, imp'd, &c., Appellant.

A motion upon notice, will not be allowed to be taken or granted *by default*, where it interferes with the power of the court in controlling their calendar.

Where a motion was made to permit a cause to be placed in the calendar, as of the time the return should have been *regularly* filed, it was denied, for the reason that such motions would derange the whole calendar, as many of the returns were undoubtedly filed after the regular time.

*July Term, 1849.*—At the last May term of this court, a motion was made to dismiss the appeal in this cause, on the ground that the return had not been filed. The motion was granted, unless the return was filed in twenty days, &c.

At this term this motion was made by respondent, on notice to have the cause placed upon the calendar as of the day the return should have been filed, if it had been regularly filed after the notice of appeal was served. The motion was not opposed.

WILLIAM SILLIMAN, *for motion.*

The question arose, whether under rule 15 of this court, a motion properly made upon notice, should not be granted of course, where there was no opposition.

The court said they had the control of their own calendar; and of course, any motion which tended to interfere with their power in this respect, would be examined and disposed of on the merits.

They denied the motion on the ground, 1st. That this question should have been introduced and decided upon the motion made at the May term. Then was the proper time to have disposed of it.

2d. That to allow a motion of this kind, permitting a cause to be placed on the calendar as of the time the return should have been regularly filed, would be, to derange the whole calendar, because many of the returns made to the court are undoubtedly filed *after* the regular time prescribed by the statute and the rules of the court.

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## COURT OF APPEALS.

### ANONYMOUS.

*July Term, 1849.*—The order appealed from in this case was an order on a re-hearing at general term of the Supreme Court, vacating an order of reference to ascertain the amount of damages occasioned by a temporary injunction.

The suit was commenced in the Court of Chancery, to rescind a sale of Kidd Salvage Company stock, on the ground of fraud. The Chancellor held the remedy was at law, and dismissed the bill. After which, the motion was made for a reference to ascertain the damages occasioned by the injunction.

This court decided that the order appealed from was not an appealable order, and dismissed the appeal.

## SUPREME COURT.

## LUCIUS F. BEARDSLEY vs. THOMAS S. DICKERSON.

Where, in an action for an injury to personal property, which arose in *Saratoga*, and the plaintiff, in his complaint, selected *Rensselaer* as the place of trial, and the defendant, before answering, served a written demand that the cause should be tried in *New York*, *held*, that the defendant was irregular in not demanding trial in the "proper county." (§ 105, old code.) It is the obvious intention of the statute that the cause shall be tried in the county designated by §§ 103 and 104, unless the place of trial is changed by the court.

The defendant having moved under the 49th section of the Judiciary Act, (Laws of 1847, page 333, which is still in force,) to change the place of trial from *Rensselaer* to *New York*; it was objected by plaintiff that issue was not joined when the notice of motion was served. (3 Howard's Pr. R. 71.) It appeared that a reply had not then been served; but, an examination of the answer showed that most, if not all of the material allegations in the complaint were denied; and, therefore, *held*, that the issues of fact arising upon the allegations in the complaint, controverted by the answer, obviated the plaintiff's objection, and that the question should be decided upon the merits.

Upon the merits, it appeared that the parties both resided in the city of *New York*, and many facts and circumstances which accrued there would necessarily be given in evidence on the trial; it also appeared that there were more witnesses residing in *New York* than in *Rensselaer*. Motion granted.

*Albany, November 24, 1848.*—This was a motion to change the place of trial from *Rensselaer* to *New York*. The action was brought for entering upon the premises of the plaintiff, at *Waterford*, and taking possession, by virtue of a pretended execution, of divers articles of personal property—and the plaintiff claimed damages for the expense he was caused in moving to set aside the execution. The affidavits were voluminous, and the facts sufficiently appear in the opinion of the court.

The defendant, before answering, had served a written demand that the cause should be tried in the city of *New York*.

H. BREWSTER, *for plaintiff*.

J. A. MILLARD, *for defendant*.

PARKER, Justice.—This action was brought for an injury to personal property, and *Rensselaer* county was designated, in the complaint, as the place for trial. The injury complained of occurred in the county of *Saratoga*, which was the proper place for trial under the 5th subdivision of section 103 of the code. By the 105th section, the defendant is authorized, before the time of answering expires, to demand, in writing, that the trial be had in the proper county. Under that provision, the defendant might have required a change of the place of trial to *Saratoga*,

but it did not authorize him to demand, as he did in this case, that the trial should be had in New York. The object of the 105th section was to enable the defendant to bring back the cause for trial to the county which the plaintiff ought to have selected under the 103d and 104th sections. It is the obvious intention of the statute, that the cause shall be tried in the county designated by sections 103 and 104, unless the place of trial is changed by the court on motion. The defendant's demand, therefore, was irregular, and can have no influence upon this motion.

But the defendant now moves to change the place of trial to New York, under the 49th section of the Judiciary Act, (Laws of 1847, page 333,) which is still in force.

The plaintiff objects, in the first place, that *issue was not joined* in the action, when the notice of motion was served. (3 How. Pr. Rep. 72.) It is stated, in Mr. Millard's affidavit, "that the reply had not been served" when the papers for the motion were served. But it does not appear, from the affidavits, whether a reply has since been served, nor is it shown that the time to reply has been extended, nor that the plaintiff denied, or intended to controvert any material allegation in the answer.

Mr. Brewster's affidavit states that the answer was put in on the 14th of October last. An examination of the answer shows that most, if not all, of the material allegations in the complaint are denied. It is shown, by affidavit, that the motion papers were served on the defendant's attorney on the 4th of November last, which was more than twenty days after the service of the answer. The time, therefore, for the plaintiff to reply, under section 131 of the code, had elapsed.

By section 205 of the code, an issue of fact arises,—

1. Upon a material allegation of the complaint controverted by the answer, or
2. Upon new matter in the answer controverted by the reply, or
3. Upon new matter in the reply.

The time for replying having elapsed, there was no issue of fact to be tried in the cause, except those arising on the allegations of the complaint controverted by the answer. The objection that issue was not joined, and that for that reason this motion is prematurely made, can not therefore be sustained.

Upon the merits of the motion, I think there are good reasons shown for trying the cause in New York. The parties both reside there, and though the cause of action arose in Saratoga, it is shown that many facts and circumstances which occurred in the city of New York must necessarily be given in evidence on the trial. It appears also that there are

more witnesses residing in New York than in Rensselaer. The stipulation offered by the plaintiff will not avail him to retain the cause in Rensselaer.

The motion to change the place of trial is therefore granted.

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### SUPREME COURT.

JAMES MYERS agt. DAVID RASBACK et al.

THE SAME agt. WILLIAM G. BORLAND et al.

The old suit in equity for the "*partition of lands*" is now merged in the "*civil actions*" under the code, and as such, may be prosecuted by *summons* and *complaint*. It is a "*regular*" proceeding, inasmuch as it is prosecuted by and against regular parties, and according to the same forms of proceeding and rules of practice with other actions under the code.

Proceedings for partition by petition under the Revised Statutes, (title 3, chap. 5, part 3,) are saved by the code; and such proceedings may also be instituted, and are just as valid now as before the code became a law. (See *Traver v. Traver*, 3 Howard's Pr. Rep. page 351.)

*Herkimer Special Term, June, 1849.—Demurrer to Complaint.*

A. LOOMIS, *for plaintiffs.*

J. A. RASBACK, *for defendants.*

GRIDLEY, Justice.—These are suits brought under the code for the partition of lands; and the defendants have demurred to the complaints on the ground that this class of actions has not been provided for by that instrument.

It is said that the 390th section of the code prohibits the bringing of such actions, and continues in force all the statutory provisions of the Revised Statutes on the subject of partition. It *does* very clearly save those provisions; and a proceeding upon petition conducted in the manner prescribed in those enactments, would be just as valid now, as it would have been before the code became a law. The reasoning of Justice Barculo, in the case of *Traver v. Traver*, (3d Howard's Sp. T. Rep. 351,) seems to me conclusive upon the construction of the section under consideration.

But it does not necessarily follow, that an action for partition cannot be prosecuted by summons and complaint under the code. The section in question does not prohibit the bringing of such an action. It merely declares that the code shall not affect proceedings provided for in cer-



tain chapters and titles of the Revised Statutes; and the provisions relating to the partition of lands, are among those embraced in the exception. If, therefore, the jurisdiction to entertain an action for partition, is elsewhere clearly conferred upon the court, there is nothing in the 390th section of the code which takes it away.

The Supreme Court possesses the same jurisdiction and the same powers as were formerly vested in the Court of Chancery. (See Laws of 1847, p. 323, sec. 16.) That court, both in England and in this state, has long possessed a jurisdiction over the subject of the partition and sale of lands; and its power to decree partition has long been fully recognized by our statutes. (2 Hoffman's Pr. 160; 2 R. S. 253, §§ 81 to 90.) The suit in equity for the partition of lands, was formerly prosecuted by the filing of a bill, and the service of a subpoena, and continued to be so prosecuted after the Revised Statutes were passed, and up to the time when the "act relating to the judiciary" went into operation, when the entire powers and jurisdiction of the Court of Chancery were transferred to the Supreme Court. (See 3d Paige, 345; 2d id. 387; 1st id. 415.)

When the Code of Procedure became a law, the Supreme Court lost none of its chancery jurisdiction. It is true that the distinction between actions at law and suits in equity was abolished, but the suit in equity survived in the form of a "civil action" prosecuted by summons and complaint. And I do not see why the old suit in equity for the partition of lands may not now be prosecuted in the form of a civil action under the code, in the same manner with every other suit of equity cognizance.

In my judgment, it is embraced within the definition of a "civil action," contained in the 2d, 4th and 6th sections of that act. By the terms of the 2d section, an action is defined to be "a *regular* judicial proceeding, in which a party *prosecutes* another for the enforcement or prosecution of a right, or the redress or prevention of a wrong."

In the opinion of Justice Barculo, to which I have already referred, a doubt is expressed whether a suit for the partition of lands is a "*regular* judicial proceeding," and also whether it is a proceeding in which one party can properly be said to prosecute another party for the "*protection or enforcement of a right*," or the "*prevention or redress of a wrong*." It may be remarked, that the reasoning of the learned justice upon this particular question was not necessary to the decision of the motion before him; but the question itself is one of very great importance, for, if this reasoning be correct, then all the proceedings in partition, instituted under the code, are "*coram non judice*," and the titles derived under them are

*void*. I have, therefore given to the subject all the consideration which the time at my command would allow; and I have come to the conclusion,

- 1st. That a proceeding in partition under the code is a "REGULAR judicial proceeding." I think an interpretation much too narrow and restricted has been given to the word "*regular*." The word is derived from *regula*, "a rule; and its first and legitimate signification, according to Webster, is, "conformable to a rule; agreeable to an established rule, law, or principle; to a prescribed mode; or according to established customary forms." I cannot think it material that the writ of partition, at common law, only lay between parceners, and that it was extended by statute to joint tenants and tenants in common. An action given by statute may be just as "*regular*" as an action of common law origin. The action of ejectment has been extended by statute to a great number of cases, to which it once had no application; and it cannot admit of a doubt that since the change effected by the statute, an action of ejectment, in the cases to which it has been extended, has been just as "*regular*" a proceeding as a writ of right or a writ of dower was before. So, too, it seems to me that a suit in equity may be just as "*regular*" a judicial proceeding, as an action at common law. The word "*regular*" seems to have been used by the Legislature as opposed to *special*, and to have been designed to distinguish "*actions*" from "*special proceedings*." The action for partition, therefore, prosecuted under the code in lieu of the old suit in equity, is a "*regular*" proceeding, inasmuch as it is prosecuted by and against regular parties, and according to the same forms of proceeding and rules of practice with other actions under the code.

- 2d. That the action for partition is in the strictest sense a proceeding in which the plaintiff "*prosecutes*" the defendant for the "*enforcement of a right*." The law has given to any man who holds lands in common with others, the "*right* to have them partitioned between him and his co-tenants, and thus to enjoy his own share in severalty. This "*right*" can be "*enforced*" only by the judgment of a competent tribunal, rendered in a judicial proceeding instituted for that purpose. It certainly cannot affect this question that the suit is sometimes amicable in its character. The right *may* be disputed and resisted; and then the proceeding is *hostile*. It is enough that the action is given, for the purpose of enabling a party to "*enforce his right*" against a hostile party, which cannot be done, except through the instrumentality of a judicial proceeding.

My conclusion, therefore, is, that the old suit in equity for the partition of lands, is now merged in the civil actions under the code, and, as such, may be prosecuted by summons and complaint. The demurrers must be overruled, with a right to withdraw them and to plead over, &c.

## SUPREME COURT.

CYRUS B. LYNCH and his wife agt. JAMES M. MOSHER.

Under the present practice a motion to change the place of trial for the convenience of witnesses need not be made till after issue joined.

The motion should be made the first opportunity after joining issue. If the cause would be thrown over a circuit in consequence of such laches, it is a sufficient reason to deny the motion.

The form of an affidavit of merits upon such a motion should correspond with the practice and decisions heretofore made therein. Three things must distinctly appear—1st. That the defendant has fully and fairly stated the case to his counsel, stating his name and residence. 2d. That he is advised by his counsel that he has a good and substantial defence on the merits. And 3d. That he believes that he has such defence. (*The question of change of venue and place of trial under the former and present statutes, reviewed.*—SILL, Justice.)

*Erie Special Term, July, 1849.*—Motion to change the place of trial from Erie to Rensselaer county. The summons and complaint in this cause were served on the 8th day of May, 1849. The defendant's answer was served on the 23d of May. On the 9th day of June, the plaintiff served a demurrer to a part of the answer, and on the 12th day of June a reply to the residue was served. Notice of this motion with an order staying proceedings were served on the 3d day of July, for the special term to be held on the third Monday of July, instant, in Erie county. A general term of this court was held in Erie county on the 18th day of June, and in Chautauque county on the first Monday of July; and special terms of this court were held in Erie county on the third Monday of May, in Niagara county on the first Monday of June, and in Orleans county on the fourth Monday of June. And the Erie circuit was appointed for the third Monday of July, but no business was done at this circuit, on account of the prevalence of the cholera at Buffalo. That part of the affidavit on which the motion is made, intended to show a defence on the merits, is as follows: "And this deponent further says, that he has a good and substantial defence upon the merits to this action, as he is advised by his counsel, A. B. Olin, Esq., of the city of Troy, in the county of Rensselaer, and as he believes truly, after having fully and fairly stated the case to said counsel."

That part of the affidavit designed to show the materiality of the testimony of the witnesses, and the necessity of having them present at the trial, is in the following form. That said witnesses "are, and each of them are material and necessary witnesses for this deponent on the trial

of this cause, as this deponent is advised by said counsel, *and he believes truly*, after having fully stated to the said counsel what he expects to be able to prove by each and every of the witnesses above named; and that without the benefit of the testimony of each and every of said witnesses, it would not be safe for this deponent to proceed to the trial of this cause, as he is also advised by his said counsel, and *as he believes truly*."

The plaintiffs reside in Erie county, and the defendant in the county of Rensselaer, and this motion is made upon the ground that a majority of the witnesses reside in the latter county.

C. O. POOLE, *for the motion*.

H. SEYMOUR, Jr., *opposed*, makes the following objections:

1. The defendant was bound, before issue joined, to have demanded in writing that the trial should be had in Rensselaer county. (Code, section 126.)
2. The defendant was bound to have given notice of his motion before issue joined. By the delay the plaintiff has lost a circuit.
3. The affidavit is defective as to the merits and as to the materiality of the witnesses. It states that the defendant believes his counsel has *advised him truly* on these subjects, and does not state that he believes he has a defence on the merits, nor that he believes his witnesses to be material.

SILL, Justice.—The power of this court to change the place of trial in transitory actions for the convenience of the witnesses and parties, was originally exercised by this court as an incident to its general jurisdiction, and I do not find that the exercise of this power in such actions was the subject of statutory provision until the Revised Statutes took effect in 1830. The change of the place of trial by an order of the court, did not necessarily require the venue to be changed. The books of practice and the Revised Statutes speak of the change for the convenience of parties and witnesses, as a *change of the place of trial*, and not a change of the venue. But as the parties stood prior to the passage of the Judiciary Act of 1847, the only practical effect of naming a venue in a declaration in a transitory action, was to indicate the county in which the trial was to be had; and the court adopted the practice of changing the venue as the method of changing the place of trial, where, for the convenience of parties and witnesses, the cause ought to be tried in a county other than that specified in the declaration. The distinction between a change of venue and a change of the place of trial in this class of cases, ceased to be important, and was practically lost sight of.

This distinction, however, becomes substantial and important by the Judiciary Act of 1847. The 46th section of that act, required the venue, when the parties resided in this state, to be laid in a county where one party resided, or an adjoining county. And if the venue was not so laid, the defendant, when serving an affidavit of merits, and notice of a motion before the time to plead had expired, was entitled as a matter of course, to an order changing the venue to such county, with costs. A change of venue was granted only in cases where the plaintiff had laid it in a county other than that where a party resided or in an adjoining county; and a defendant, to avail himself of this irregularity, must serve an affidavit of merits, and give notice of a motion to correct it before the time to plead expired, or the objection was waived.

The change of the place of trial as authorized by section 49, was a different proceeding, and did not carry with it a change of the venue, nor did the provision in section 46, requiring the motion to change the venue to be noticed before the time to plead expired, have any application to a motion to change the place of trial under section 49. The time to make the latter motion was left to the practice as it stood before, or as it may have been affected by provisions of that act other than those found in section 46.

Sections 125 and 126 of the code, are substantially a re-enactment of section 46 of the Judiciary Act. The only changes which it is necessary now to notice being, that the code requires the venue to be laid in a county where a party resides; the words "the county designated for that purpose in the complaint," are used instead of the word "venue." And instead of providing for the service of an affidavit of merits and notice of motion to change the venue, the defendant must, before the time to plead expires, demand in writing that the trial be had in the proper county, that is, a county where a party resides.

The word venue, indeed, is not used in these sections, and perhaps was intentionally avoided; but its use has not been prohibited, nor its meaning change by any statute. It is a word as significant and appropriate as it has been, and under the code means the county specified in the complaint as the place of trial of the cause. Taking the liberty, then, of using this well-defined term for the words "place of trial" in section 125 and 126, and it will be readily seen that they are intended as a substitute for section 46 of the Judiciary Act, and designed solely to regulate the venue in the cause. Where a county in which a party resides is designated in the first instance, section 126 has no application. This section is designed to give the defendant his remedy when the plain-

tiff has not laid his venue in the proper county. And in such case, the defendant, by serving the written demand, is entitled to have the trial in the proper county—that is, a county which is the residence of a party.

If my views are correct, section 126 has no reference whatever to a motion to change the place of trial for the convenience of witnesses or parties, but the sole object of that section is to point out the manner in which the defendant is to take advantage of the plaintiff's irregularity when the venue is laid in the wrong county. The written demand required by that section, was neither necessary nor proper in this case, the venue having been laid in the county where the plaintiffs reside.

2d. It is objected that the defendant has been guilty of laches, in omitting to give notice of his motion before issue joined.

Prior to 1830, and before the enactment of any statute providing for the change of the place of trial in transitory actions, the rule was well settled that the defendant must embrace an opportunity, if one presented, to make his motion, which would not put the plaintiff over a circuit or a term. And he was required to move before issue joined, if waiting till after issue would have this effect. (*Chapin v. DeGroff*, 4 Cow. 554.)

The Revised Statutes provided that issues of fact joined in the Supreme Court, in transitory actions, should be tried in the county where the venue was laid, unless the court should deem it necessary for the convenience of the parties and their witnesses, or for the purpose of a fair and impartial trial, "to order such issues to be tried in some other county," in which case they were to be tried in the county so designated. (2 R. S., 407.)

Under this statute the Supreme Court pursued the same practice which had previously prevailed, and required the defendant to move to change the place of trial before issue joined, if the delay till after issue would put the plaintiff over a circuit or term. (*Lee v. Chapin*, 11 Wend. 186.)

Then came the Judiciary Act of 1847, by the 49th section of which it is provided, that the Supreme Court shall have power "to order any issue of fact joined in any suit," to be tried in any county, on good cause shown therefor, and on such terms, and under such rules and regulations as the court shall prescribe. The code then provides that trials shall be had in the county where one of the parties reside, "subject, however, to the power of the court to change the place of trial in the cases provided by statute. (Section 125.)

The code, it will be observed, does not undertake to define the cases in which the place of trial, (as distinguished from the venue) shall be changed, but leaves this question as it stood under former statutes. Its only effect is, to take from the court the exercise of this power as a part of their

general jurisdiction, and confine it to "cases provided by statute," and the right to exercise this power is now derived from the Revised Statutes above cited, and the 49th section of the Judiciary Act of 1847. Whether these statutes are both in force, or the latter is to be regarded as having superseded the former, it is not, in my view, necessary now to determine, for so far as they affect the present question, the provisions of both are substantially the same. The Revised Statutes provided that "issues joined" in transitory actions should be tried in the county where the venue was laid, unless the court ordered "such issues to be tried in some other county." The first clause of the 49th section of the Judiciary Act provides that the court shall have power "to order any issue of fact joined," &c., to be tried in any county. Were the question now for the first time presented, whether under the Revised Statutes, the defendant was bound to make his motion before issue joined, I should be inclined to the opinion that he was not. The provision is, that *the court may order an issue joined to be tried in another county, &c.* The language seems to imply that an issue was to be first joined, and that the cause should proceed to this point before it is in readiness for an order of the court relative to the place of trial. While the practice remained uncontrolled by any legislative enactment, it was no doubt competent for the court to adopt such rules as they thought proper—and it is not impossible that the practice on this subject prior to 1830 was subsequently adhered to, without a careful reference to this statute. However this may be, I am not at liberty to substitute my own construction of that statute for that uniformly given to it by the late Supreme Court, and their practice ought still to be pursued, unless subsequent legislation has furnished some reason for a departure from it. I have not been able to discover any such reason in the act of 1847. The section cited from the Revised Statutes, and the first clause of section 49 of the act of 1847, are in substance the same; the latter act may be regarded as a substitute for, or a revision of the former, and there is nothing in the change of phraseology of the latter from which any intent on the part of the Legislature to change either the law or the practice, can be inferred relative to the time when the motion to change the place of trial should be made. Had not this question been already passed upon, I should have been led to the conclusion that the practice in this respect had not been changed by the Judiciary Act, and that the defendant was, notwithstanding its provisions, bound to embrace the first opportunity to make his motion, irrespective of the fact whether issue were or were not joined. It was, however, decided in *Brainard v. Wheeler*, 3 Howard, 71, that under section 49 of the Judiciary Act, the court was authorized to change the place

of trial, only when issue had been joined. The grounds for this decision are not stated, and hence, I have not the benefit of the reasoning which led the learned justice to the conclusion adopted in that case.

The latter clause of section 49, declares, that when the place of trial shall be changed, the clerk of the county in which the same shall be had, shall certify the minutes of trial, and they shall be filed in the county "where the said issue was joined."

A hasty reference to this clause might leave the impression, that by necessary implication, issue must be joined before an order could be made changing the place of trial—such, however, is not necessarily the case. The Judiciary Act was silent as to the place of filing pleadings in suits commenced after the act took effect. By the fifth rule of the court, all papers in a cause are to be filed, and all rules entered in the office of the clerk of the county where the *venue is laid*, or to which it has been removed.

As has been already seen, changing the place of trial, does not change the venue. And although an order changing the place of trial were made before issue, still the papers would be filed and issue joined in the county where the venue was laid, and such order would not produce any embarrassment in complying with the latter clause of section 49.

The great change which the Code of Procedure has introduced presents this question, however, in a new light.

In *Lee v. Chapin*, (11 Wend.) Mr. Justice SAVAGE says, "on receiving the declaration the defendant becomes apprized of the nature of the plaintiff's claim, and is as competent then to judge of the necessity of a change of venue as he can be after issue joined."

The court assumed, that, under the system of pleading then existing, after the defendant had seen the declaration, and the plaintiff was informed that the suit was to be defended, the parties were able with reasonable certainty to anticipate the character of the issue to be joined, and hence each could determine in that stage of the cause, what witnesses would be required upon the trial. Whether this assumption was in all cases justified by the result, it is not necessary to inquire, for the rule of the old Supreme Court was based upon it, and had no other sufficient foundation. Now, however, the case is widely different. Until the answer comes in the plaintiff cannot safely swear that a single witness will be necessary for him on the trial. And when new matter is set up in the answer, the defendant cannot know, nor can his counsel advise him, what witnesses will be needed for his defence. It seems to be a necessary result of the change in the system of pleading, that the defendant cannot determine



whether a change of the place of trial will be necessary, nor can the plaintiff determine whether he should oppose it, until all the pleadings in the cause are served. I am, therefore, satisfied that, under the present practice, a motion to change the place of trial for the convenience of witnesses, need not be made till after issue joined.

In the present case, however, the defendant has been guilty of laches in neglecting to make his motion on the fourth Monday of June or first Monday of July, there having been sufficient time to notice the motion for those terms after the reply was served. By letting those terms pass and moving on the third Monday of July, the consequence must be to throw the cause over the circuit held on that day. This would have been a sufficient reason for denying this motion, if any business had been done at that circuit.

3. The plaintiff objects to the form of the affidavit. Three things must distinctly appear in an affidavit of merits.

1st. That the defendant had fully and fairly stated the case to his counsel, stating his name and residence.

2d. That he is advised by his counsel that he has a good and substantial defence on the merits, and

3d. That he believes that he has such defence.

This last requisite is wanting in this affidavit. The defendant does not swear that he believes that he has a defence, but that he believes his counsel has advised him *truly*; in other words, that he has given honest advice. The affidavit is substantially like that in *Britain v. Peabody*, 4 Hill, 61, which was held bad. That part of the affidavit relating to the materiality of the witnesses is also defective in the same particular. The defendant does not swear that he believes the witnesses material, &c., but that he believes his counsel gave him true or honest advice. Other questions were raised, which I will not now examine. The motion must be denied with ten dollars costs.

At the July circuit no business was done on account of the prevailing epidemic, and this cause would not have been tried if it had been on the calendar. As the plaintiff has not, therefore, been in fact delayed by the omission to make the motion at an earlier day, the defendant is at liberty to renew it, provided he does so at a term so early that if the motion is denied the cause will not be carried over the next Erie circuit.

## SUPREME COURT.

WILLIAM HULBURT and MARY CAROLINE, his wife, agt. BYINGTON  
NEWELL.

In suits brought by infants, a next friend is not necessary, nor is he liable for costs only in cases where the infant is *sole plaintiff*. A suit must be commenced *in the name of an infant—sole plaintiff*—to entitle the defendant to security for costs. (2 R. S. 446, § 2.) An *attorney* is only liable for costs, (\$100,) where the defendant could have required security to be filed. *Held*, that where a husband and infant wife brought a suit, jointly, the defendant was not entitled to security for costs, although the husband was appointed and named in the proceedings as next friend of the wife.

*Wayne Special Term, July, 1849.—Motion for \$100 costs against the plaintiff's attorney.* The husband, whose wife was an infant, united with her in bringing an action against the defendant for a demand claimed to be due her before her marriage. The action was in their joint names and the husband, before the commencement of the suit, being himself of full age, was appointed next friend for his wife, and, in addition to being named as plaintiff, was also in the proceedings styled next friend.

The defendant required the husband to file security for the costs of the suit, which he refused to do. Having succeeded in defeating the action, the defendant now moves for costs against the plaintiff's attorney.

JOHNSON, Justice.—By 2 R. S. 446, § 2, before any process can be issued in the name of an infant who is *sole plaintiff*, some competent and responsible person must be appointed to appear as next friend in the suit, who shall be responsible for the costs thereof. Where the suit is commenced *in the name of any infant* whose next friend has not given security for costs, the defendant may require *such plaintiff* to file security for the payment of the costs that may be incurred. In such case, *where the defendant at the commencement of the suit shall be entitled to require security for costs*, the attorney shall be liable for such costs not exceeding \$100, whether security has been demanded or not. (2 R. S. 620, § 1-7.)

From the plain reading and intent of the statute, a next friend is only necessary where an infant is *sole plaintiff*, and it is only in such cases that such next friend is chargeable with the costs of the suit. The attorney is only liable where the defendant could have required security for costs to be filed—and this can be done only where the suit has been commenced *in the name of an infant*, and not where an infant is only named as one of several plaintiffs. A suit cannot be said to have been commenced *in the name of one of several plaintiffs*. It is then a suit in

their joint names, and not in the name of either one of the parties who unite in the prosecution. Here the suit was in the name of the husband and wife, and not in that of the wife alone, and no security could have been required at the commencement of the suit, or at any other time. The husband, being an adult, was liable for the whole costs, at all events, in case of defeat. This makes the statute harmonious in all its provisions, on the subject of suits brought by infants. No next friend is necessary, except where the infant is sole plaintiff, and *then* the liability for costs is imposed. Nor can the defendants require security for costs to be filed in any other case. The suit must be commenced *in the name* of the infant. So that, whether we adopt what writers have denominated a rigorous construction, by adhering to the sense of the words of the statute, or that tempered by the equity and spirit of the law, the attorney is not responsible.

Motion denied, but without costs.

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#### SUPREME COURT.

ELIZABETH WILLIAMS agt. ROBERT MILLER.

An action for a *breach of promise of marriage* is within the class specified in the *first* subdivision of the 129th section of the code, where the summons is issued in conformity therewith. It is an action arising on contract, and is for the recovery of money only.

*Albany Special Term, August, 1849.*—This action is brought to recover damages for the breach of an alleged promise of marriage. The summons is in conformity with the *first* subdivision of the 129th section of the code, and specifies \$5000 as the sum for which the plaintiff will take judgment, if the defendant fail to answer. A motion was made by the defendant to set aside the summons, on the ground that the notice required to be inserted therein should have been under the *second* subdivision of the 129th section, instead of the first.

M. PECHTEL, *for defendant.*

H. HOGEBOOM, *for plaintiff.*

HARRIS, Justice.—I see no ground upon which this motion can be sustained. The action is clearly within the class specified in the *first* subdivision of the 129th section. It is an action arising on contract—of this there can be no doubt. It is also for the recovery of money—no other relief is sought. It does not, therefore, belong to the “*other actions*” to which the *second* subdivision of the section applies. It is true that the

proceeding upon default, provided in the first subdivision of the 246th section, do not seem entirely appropriate to the nature of an action like this. If the complaint is sworn to, the plaintiff, upon the defendant's failure to answer, becomes absolutely entitled to judgment for the amount of damages specified in the summons. If the complaint be not sworn to, it then becomes the duty of the clerk, a duty somewhat delicate and novel, I admit, "*to ascertain the amount which the plaintiff is entitled to recover from her examination under oath, or other proof.*" It may be that the Legislature would have excused the clerk from the performance of this duty in this particular class of cases, had it been brought to their attention; but the provisions referred to relate to actions on contract generally, and this being such an action, is not excepted from the general provision; and perhaps it is well enough that it is so. It may not, in every case, be a pleasant duty for the clerk, yet I have no doubt it will generally be discreetly performed. The motion must be denied, but without costs.

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## SUPREME COURT.

JOHN PINDAR agt. JAMES BLACK.

In an *affidavit* upon which an *order of arrest* is to be founded, (§ 481) two things must be made to appear: 1st, that a sufficient cause of action exists; 2d, that it is among those specified in the 179th section.

It is not sufficient for the party making the affidavit to state that "his case is one of those mentioned in section 179." It must appear from the facts stated that it is such a case. It is not necessary that the affidavit should state that "an action has been, or is about to be commenced."

It is not necessary that the *name* of the party to be arrested should be stated. If unknown, he may be designated as *the real defendant* in the suit or proceeding, and whose name is not known, or by any name. (§ 175.)

The *entitling the affidavit in a suit* (which, under the former practice, was fatal,) may now be disregarded, under § 176 of the code, as not affecting the substantial rights of the adverse party.

*Albany Special Term, August, 1849.*—This was a motion to vacate an order for the arrest of the defendant, upon the ground that the affidavit upon which it was granted was insufficient. The affidavit was as follows: "Supreme Court. *John Pindar v. John Doe.* Albany county, ss.: John Pindar, being duly sworn, deposes and says, that on the 22d day of May, 1849, *the real defendant* in this suit, and whose name is not now known to this deponent, was in command of the sloop *Hornet*, of Troy, on her passage up the Hudson river, which, at said time, while

before the wind, wrongfully ran into the seine net of this deponent at Catskill, in the county of Greene, and damaged the same to the loss of this deponent of \$125, or thereabouts; and said sloop afterwards continued on her course up said river, without offering or making reparation for the said injuries; and that the real defendant in this cause had command of said sloop at the time of the said damage and injury to the property of this deponent." Upon this affidavit, Mr. Justice PARKER made an order for the arrest of *the defendant*, and that he be held to bail in the sum of one hundred dollars.

J. K. PORTER, *for defendant*.

JAMES PARKER, *for plaintiff*.

HARRIS, Justice.—The requisites of an affidavit upon which an order of arrest is to be founded, are prescribed in the 181st section of the code.

Two things must be made to appear. First. That a sufficient cause of action exists; and then, that such cause of action is among those specified in the 179th section. Let us try the sufficiency of the affidavit in this cause by this test. And, first, as to the cause of action. It is stated positively, that the sloop *Hornet*, while under the command of the defendant, wrongfully ran into the seine net of the plaintiff, and injured it to the extent of \$125. This I regard as equivalent to saying that the defendant had wrongfully injured the plaintiff's property. If this be so, "a sufficient cause of action is shown to exist." Then, is it a case within the 179th section? If a cause of action exists at all, it is, as we have seen, *for injuring property*, and is therefore within the very letter of the first subdivision of the section last mentioned. It cannot be necessary, indeed, I do not think it would be sufficient, for the party making the affidavit, to state that "his case was one of those mentioned in section 179. It is enough that the judge can see from the facts stated, that it is such a case; and unless facts enough to show this are stated, the affidavit is insufficient. Assuming the facts stated in the affidavit to be true, the plaintiff had a sufficient cause of action against the defendant, and that cause of action was one upon which he had a right to have the defendant arrested. I do not think it necessary that the affidavit should state that an action has been, or is about to be commenced. By the 183d section, it is provided, that the order of arrest may be executed when the summons is served, or at any time afterwards. To require the party, when he applies for the order, to state that he is about to commence an action, would be equivalent to requiring him to say he intends to make use of the order; but it is enough that the statute does not demand such a statement.

The next ground of objection is, that the affidavit does not show *who committed* the injury. It is true the name of the party against whom the order was sought, was not given. The plaintiff states that it was unknown to him. But he says his cause of action is against the person whatever his name, who, upon the occasion of the injury, had command of the vessel. He thus identifies the defendant, and with as much, perhaps greater accuracy, than he would, if he had merely given his name. The judge, accordingly, makes his order to arrest the defendant—not, indeed, to arrest James Black—but to arrest the man who was in command of the sloop Hornet when the injury was done—which as well describes James Black, as though he had been called by name. In either case the officer would have to rely upon information *aliunde*, to determine who was the defendant. In the one case, he must ascertain what person bore the name of James Black; and, if he should happen to find several designated by that name, he would then be under the further necessity of ascertaining as best he might, which James Black was intended. In the other case, he would only have to ascertain who was, at the time specified in command of the sloop Hornet. The plaintiff being ignorant of his name, was authorized by the 175th section to designate him by any name, in any pleading or *proceeding*. He might as well call him "*the man in command of the sloop Hornet*," as by any other name, more brief, but less distinctive.

The only remaining point urged by defendant's counsel in support of his motion, which it is necessary to notice, is, that the affidavits is entitled in a cause which as yet had no existence. Under the former practice, this objection might have been fatal to the proceedings. It seems to have been settled by authority, though I have never been able to perceive the soundness of the reason upon which the rule was founded, that affidavits to hold to bail must not be entitled. The only reason that has ever been assigned for the rule is, that as the affidavit purports to be made in a suit when in fact no suit is pending, an indictment for perjury could not be sustained, if the affidavit should prove to be false. I can see no difficulty, however, in sustaining an indictment, containing proper allegations, in such a case. But whatever should have been the rule under the former practice, it is enough to say now, that the error or defect, if it be one, "does not affect the substantial rights of the adverse party," and I am, therefore, required by the 176th section of the code to disregard it. The motion must be denied; but as the questions are new, the defendant ought not to be charged with the costs of the motion.

## SUPREME COURT.

WILLIAM H. GLENNY against JAMES HITCHINS and BENJAMIN H. HORTON.

A *demurrer*, under the code, must *distinctly specify* the grounds of objection; unless it do so, it may be disregarded. (Sec. 145.) The general allegations, that "facts sufficient to constitute a cause of action are not stated in the complaint," that the complaint may be true, and yet the plaintiff not entitled to recover," are substantially the language of a general demurrer under the former practice, and are not now allowed in any case.

Where a complaint alleges "*the sale and delivery of goods*," as a cause of action, it is not necessary to allege a *promise* on the part of the defendant to pay, &c., as was formerly necessary. A statement of *the facts constituting the cause of action in ordinary language*, &c. (§ 142,) is now sufficient; that is, all the facts which, upon a general denial, the plaintiff would be bound to prove, to entitle him to a judgment.

*At chambers. Motion for judgment, upon a frivolous demurrer, under section 247 of the code.*—The complaint in this cause, after the title of the cause, is as follows:

"Erie county. The above named William Glenny complains of the defendants, that the plaintiff sold and delivered to the defendant, between the 19th day of April, and the 24th day of May, 1849, crockery, gas fixtures and glass ware, to the amount and value of four hundred and eighty-six dollars and sixty-three cents; for which sum the defendants are justly indebted to the plaintiff, and for which sum the plaintiff demands judgment."

The time for answering has expired, and no answer has been put in by the defendant Horton.

The defendant Hitchins appeared and demurred to the complaint, specifying the grounds of the demurrer in the following form: "That said complaint does not state facts sufficient to constitute a cause of action against the defendants, inasmuch as it does not state any legal liability on the part of the defendants to the plaintiff, nor that they ever promised to pay the plaintiff any sum whatever; and that all the plaintiff alleges may be true, and the defendants not be liable to the plaintiff therefor.

T. BURWELL, *for the plaintiff.*

G. W. HOUGHTON, *for defendant Hitchins.*

SILL, Justice.—The Code of Procedure requires that a demurrer shall distinctly specify the grounds of objection to the complaint; and unless it do so, it may be disregarded. (Sec. 145.)

The general allegations, that facts sufficient to constitute a cause of action are not stated in the complaint; that the complaint may be true, and yet the plaintiff not entitled to recover, are substantially the language of a general demurrer under the former practice, and are not now allowed in any case.

In the present case two causes only are specified as the code requires, to wit: *that the complaint does not state a promise by the defendants to pay*, and it does not *state any legal liability on the part of the defendants*. Under the old system of pleading, the statement of a promise in this class of actions was indispensable, and this was the allegation which the defendant must put in issue by this plea. All the matters which went to show the defendant's liability upon his promise were set out as inducement, or as a consideration for the promise; and under the issue thus formed, the plaintiff was put to the proof of all these matters which were requisite to give legal efficacy to the defendant's undertaking. The promise in many cases was never in fact made, but was an inference of law from the other facts stated in the declaration and proved on the trial.

The code has made a radical change in this respect. All forms of pleading heretofore existing, inconsistent with it, are abolished, and the form and sufficiency of pleadings are to be determined by its provisions. (Sec. 140.) And now the complaint is good if it contains a statement of *the facts constituting the cause of action in ordinary language*. (Sec. 142.) A detail of the *evidence* of the facts on the one hand, and legal inferences on the other, are to be alike avoided. And if the complaint contains all the facts which upon a general denial the plaintiff would be bound to prove, to entitle him to a judgment, it then clearly contains "a statement of the *facts constituting the cause of action*," and is sufficient under the code.

The sale and delivery are the issuable facts in the present case; and these sustained by testimony, determine the case for the plaintiff, or if successfully controverted, defeat the action; and the statement of a promise, if superadded, would not be a fact controverted in the case, but would be a legal inference to follow or fail, as the facts averred shall be found true or false.

Suppose the plaintiff had in this case alleged that the defendants promised to pay the sum claimed, and the defendants by their answer had simply denied the promise, leaving the other allegations as they have by the demurrer admitted. Upon the face of the pleadings, the plaintiff must have judgment; for upon the admission of the sale and delivery the law adjudges a promise to pay. This result could only be avoided by proof



of some new matter, as payment, fraud in the sale, or other matter in avoidance which would be clearly inadmissible under such an issue : for the intention of the code is too clear to be mistaken, that such defences must be set out as matters of avoidance, in order to allow its admission in evidence. The only effect then of such allegation in the complaint would be to invite an immaterial issue, and to present on the record the denial of a legal inference which is established by the facts admitted.

What has been said on the subject of alleging a promise, applies also to the other objection, that the complaint does not state that the defendants are legally liable to pay the debt.

The defendant also objects that the liability of the defendants is joint, and the plaintiff is asking for a several judgment against Hitchins. If the cause were not in readiness for judgment against the defendant Horton, there would be a difficulty in ordering judgment now against Hitchins. Perhaps there might be an order declaring the demurrer frivolous, and directing judgment to be entered against Hitchins whenever the plaintiff should be entitled to take judgment against Horton ; but this question need not now be decided.

The papers handed up show that more than twenty days have elapsed since the service of the summons and complaint on both defendants, and that Horton has not answered, and this demurrer is the only obstacle to judgment against both. This objection does not therefore arise in this case, for judgment will be entered jointly against both defendants.

It is also objected, that this motion cannot be made here (Batavia, Genesee co.) the venue being in Erie. Motions may be made at any place in the district where the venue is laid ; and by section 147 of the code, this class of motions may be made out of court. Motion granted, and judgment ordered with ten dollars costs.

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## SUPREME COURT.

### THE CATSKILL BANK agt. SANFORD.

By § 428 of the code, the writ of *scire facias* is abolished, and the remedies provided by §§ 283 and 284, substituted therefor. The saving clause in § 428 relates only to proceedings by *scire facias* commenced before the code took effect, whether judgment had been rendered thereon or not.

*Columbia Special Term, June, 1847.*—The judgment was obtained in this action, in December, 1842. Sundry payments were made thereon

leaving due, as the plaintiffs contend, on the 10th March, 1849, the sum of \$363.50, with interest from that day.

On the 4th May, 1849, the plaintiff's attorney issued a writ of *scire facias quare executionem non*; which the defendant, at the late special term in Columbia county, moved to set aside, on the ground that it is a remedy abolished by the code.

M. SANFORD, *for the motion*, cited code, §§ 283, 428.

ROBERT DORLON, *contra*.

WILLARD, Justice.—The amended code took effect prior to the issuing of this *scire facias*, and must control the rights of the parties. By § 428 the writ of *scire facias* is abolished, and the remedies prescribed by the code, (§§ 283 and 284,) are substituted. The saving clause in § 428 relates only to proceedings by *scire facias* commenced before the code took effect, whether judgment had been rendered therein or not. The motion contemplated by § 284 renders a *scire facias* unnecessary, and is a more simple and less expensive remedy. I will set aside the *scire facias* for irregularity, but without costs and without prejudice.

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## SUPREME COURT.

### THE CATSKILL BANK *agt.* SANFORD.

The 283d and 284th sections of the amended code (in relation to issuing executions) are applicable, as well to judgments rendered before the code took effect, as those rendered in actions under it.

Now, in all cases, executions may be issued immediately upon perfecting judgment, and at any time within five years thereafter. After five years, no execution can be issued without leave of the court upon motion.

*Albany Special Term, August 7, 1849.*—On the 15th of December, 1842, the plaintiffs recovered a judgment against the defendant for \$2240.33 damages and \$46.33 costs, upon which they claim a balance of \$363.50 yet due. A motion is made for leave to issue execution to collect this balance. The defendant denies that anything is due upon the judgment.

R. DORLON, *for motion*.

M. SANFORD, *opposed*.

HARRIS, Justice.—I was inclined to think, upon the argument, that the plaintiffs should have brought their *scire facias* under the power reserved

in the last clause of the 428th section of the code. But it has been held by Mr. Justice Willard, upon a former motion in this cause, that the clause referred to relates only to proceedings by *scire facias* commenced before the amended code took effect, whether judgment had been rendered or not. I am satisfied, upon examination, that the decision was right. The 283d and 284th sections of the amended code are applicable, as well to judgments rendered before the code took effect, as to judgments rendered in actions brought under the code. So that now, in all cases, execution may be issued immediately upon perfecting judgment and at any time within five years thereafter; and after five years no execution, in any case, can be issued without leave of the court upon motion. That this is so, will be obvious upon comparison of the sections mentioned, together with the 8th section, with the corresponding sections as they stood in the code before it was amended. The motion is, therefore, properly made; but as the defendant denies that anything is due upon the judgment, I shall direct a reference to Judge Tremain, to report the amount, if anything, remaining due; and that upon filing his report with the clerk of Greene, the plaintiffs be at liberty to issue execution for the amount by him to be due.

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## SUPREME COURT.

MARY D. WHITE agt. LYMAN WHITE.

The second section of the act of April 7, 1848, (Sess. Laws of 1848, p. 307,) which reads as follows: "The real and personal property, and the rents, issues and profits thereof, of any female now married, shall not be subject to the disposal of her husband, but shall be her sole and separate property as if she were a single female, except so far as the same may be liable for the debts of her husband heretofore contracted," declared *unconstitutional and void*, being in violation of the *first section of article one of the constitution of this state*, which reads as follows: "No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers." It also contravenes the 6th section of article one of the constitution of this state, the last clause of which reads as follows: "No person shall be subject to be twice put in jeopardy for the same offence; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

*Held*, that there is nothing in the constitution of the United States which invalidates this statute, for the reason that there is nothing prohibiting a state Legislature from taking away vested rights, unless they arise out of a contract; and as the marriage

relation is not created by what is understood to be a *contract* in the strictest common law sense of that term, and is not what in popular language and common parlance is understood by the word contract—the Legislature always having power to dissolve it—it is not a contract within the spirit and meaning of the prohibitory clause of art. 1, sec. 10, 1st sub. of the Constitution of the United States.

*September, 1849.*

R. COOPER, *for plaintiff.*

C. FIELD, *for defendant.*

This is a complaint filed by the plaintiff, who is the wife of the defendant, against her husband, to protect what she claims is her rights in relation to her real estate, and to restrain the defendant from interfering with the same. The complaint states that the plaintiff, as the heir-at-law of Richard Cary, succeeded to certain real estate as tenant in common with seven others of the children of the said Richard Cary, and that she the plaintiff married the defendant in 1819, and that there are six children now living, the issue of such marriage. That proceedings in chancery were taken to make partition among the children of the said Richard Cary of said lands, and that such proceedings were had. That on the 28d day of July, 1828, commissioners to make partition were appointed, who assigned and allotted to the plaintiff, as one of the heirs-at-law of the said Richard Cary, in the names of herself and the said defendant her husband, a certain farm known as lot No. 6, containing 100 acres, situated in the town of Springfield in the county of Otsego, and also several other farms on said tract, amounting in the aggregate to 470 acres, or thereabouts. That said commissioners made their report of partition, and the same was confirmed by the court on the 5th day of December, 1828, and a final decree of partition made; and that plaintiff moved on and took possession of said lot No. 6, assigned to the plaintiff as aforesaid; and from that time has continued to reside on and occupy said lot until within the last few weeks, during which time the plaintiff has been prevented from occupying said premises, and living in the dwelling house, by said defendant. The complaint sets forth, also, that since the said partition the defendant has had the management and control of the property, and has enjoyed the receipts, rents, issues and profits of the same. That the defendant is a man of idle habits, addicted to the use of spirituous liquor to such a degree as to become frequently intoxicated. That he has been careless and improvident in the management and cultivation of said farm, and greatly neglected the same; and that since the passage by the Legislature of this state of the law for the more effectual protection of the property of married women, the defendant has avowed to the plaintiff his determination

to exercise the exclusive control and direction of the said farm, and has prevented the plaintiff from having any power or control over the same, stating attempts by her to use and control the property, and the prevention by the defendant, and finally the entire expulsion of her from the house and premises, and this by personal force and violence, and a refusal of the defendant to permit her to return and live in the house or upon the premises, and an entire omission and refusal of the defendant to provide for her or her family, and an increase of the intemperate habits of the defendant, concluding with a prayer for the relief above stated; and to this complaint the defendant has interposed a demurrer, alleging as the grounds of demurrer,

1st. That the court has no jurisdiction and no power to grant relief.

2d. That the complaint does not state facts sufficient to constitute a cause of action, inasmuch as it appears from the complaint that the rights of the defendant to the property in question were vested rights, and claiming that the act of April 7th, 1848, enacted for the protection of the property of married women, cannot apply to the case.

MASON, Justice.—The second section of the act of April 7th, 1848, under which the plaintiff claims the possession of the property in this case, and that the defendant be restrained from interfering with the same, is as follows: "The real and personal property, and the rents, issues and profits thereof, of any female now married, shall not be subject to the disposal of her husband, but shall be her sole and separate property, as if she were a single female, except so far as the same may be liable for the debts of her husband heretofore contracted." It is true, courts incline against such a construction of the statute as would give it a retrospective action so as to take away a vested right. (7 Johns. R. 477.) But where the intention of the Legislature is apparent, it is the duty of the courts to see that the statute has its full effect, and is not eluded by construction. (15 Johns. R. 358.) I do not for a moment doubt that it was the intention of the Legislature in this statute, to give to the wife control over her real estate, and to sever the husband's rights to possess it. This, it seems to me, is most manifest from the plain reading of the statute itself. The husband, by marriage, does not become absolute proprietor of the wife's inheritance; but as the governor of the family, is so far master of it as to receive the profits of it during his life, but has no power to make an absolute sale of it without her consent. (Bacon's abridgment, Baron and Feme, letter C., 2d vol., page 15, Bouvier's ed.) This is an estate growing out of the marital relations, and is wholly dependent upon them. In the language of the common law, the husband becomes a tenant by the

courtesy, the title in fee remaining in the wife. This is one of the legal effects which the common law attaches as the effects of the marriage. The wife's legal existence and authority is in a degree lost or suspended, and the husband succeeds to the possession of her lands and takes the rents and profits *jure uxoris*, and if the wife dies before the husband without having issue, her heirs succeed to the estate. If, however, there has been a child of the marriage born alive, the husband takes the estate absolutely for life as tenant by the courtesy. (2 Kent's Com. 130, 131, 2d ed.) The only difficulty which I have encountered in this case to giving the plaintiff the relief sought by the complaint, arises from the doubts which have arisen in my mind as to the validity of the statute under consideration. There have been three considerations urged against the validity of this statute, and which we cannot avoid considering in this case, however grave or delicate the questions may be, and it would be but arrogance in me, did I not feel and confess my inability in the determination of questions of so grave magnitude. The determination of the questions raised in this case is a duty, however, from which we cannot be excused, however unpleasant the performance of it may be. The validity of this act of the Legislature must be faithfully examined and impartially determined. The first objection raised against the validity of this statute is, that the Legislature have transcended their authority as a state Legislature. In short, that this second section of the statute is in conflict with the constitution of the United States and consequently void; that it is a statute in conflict with that provision of the constitution of the United States which prohibits a state from passing any law impairing the obligation of a contract. The argument is that the relation of husband and wife is created by a contract of the parties, and is to be regarded as a mere civil contract between the parties. That by virtue of the contract of marriage between the parties in this case, the husband succeeded to all the plaintiff's personal property and to the rents and profits of her real estate during coverture at least, and that the statute under consideration takes away from the defendant in this suit these vested rights of property, and thereby assails and impairs the obligations of the marriage contract by taking away all these rights of property to which the husband succeeded under it. This question has not arisen in the courts of this state, and I am not aware of any adjudication of the question in any other states of the Union. I have looked carefully into the reports of the adjudication of the United States courts and do not find any adjudication of the questions by these tribunals. I am aware that in the case of *Dartmouth College v. Woodward*, 4th vol. U. S. Condensed Reports, 576 and

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577, the late lamented Justice Story intimates the opinion that the contract of marriage is a contract within this prohibition of the constitution of the United States. To use his own language in that case, "If under faith of existing laws, a contract of marriage be duly solemnized, or a marriage settlement be made, (and a marriage in law is always a valuable consideration for a contract) it is not easy to perceive why a dissolution of its obligations, without any default or assent of the parties, may not as well fall within the prohibition as any other contract, for a valuable consideration. A man has just as good a right to his wife, as to the property acquired under the marriage contract. He has a legal right to her society and her fortune, and to divest such right without his default and against his will, would be as flagrant a violation of the principles of justice as the confiscation of his own estate. I leave this case, however, to be settled when it shall arise." (4 U. S. Condensed R. 577.) This language is obiter and has not, therefore, the weight of authority, however we might respect it as the opinion of a learned judge. I have bestowed the most deliberate consideration upon this branch of the case, and have come to a conclusion adverse to that intimated by the learned judge in the case above cited. At the time of the adoption of the constitution of the United States, the power of the state Legislature to control and modify the marriage relation, with all its incidents, was unquestioned, and the subject was considered peculiarly within the province of state legislation, and I cannot think that it was against any abuses of this right by state legislation that this constitutional provision was framed, and that it would, therefore, be a violent presumption to suppose that it was the intention of the framers of the national constitution to divest the states of their right to legislate upon this subject, and I apprehend that this is the first attempt that has seriously been made to bring the relation of husband and wife within the prohibition of this clause of the constitution respecting contracts, while it cannot be denied, on the other hand, that all of the obligations growing out of this relation, have in repeated instances been wholly annulled by special laws passed by the Legislatures of the different states granting divorces to the parties. In many of the states of the Union there is no judicial remedy by one party against the other, for a breach of the obligations of the marriage relation. The only remedy being by divorce, which is granted by the Legislature alone. This is the case in several of the states at the present time, and I am not aware that the legislative power of a state, thus wholly to annul the marriage relation, has ever been seriously questioned. It is a power which has been exercised by most, if not by all the states of the Union. And it was adjudged in the case of *Starr v. Pease*, (8 Conn.

R. 5, 41,) that a legislative divorce, *a vinculo*, for cause, such as a breach of the marriage obligations, was constitutional and valid, and such is the opinion of Chancellor Kent in his Commentaries, (2d Kent's Com. 107, 3d ed.) And the opinion of Chief Justice Marshall in the case of *Dartmouth College v. Woodward*, is to the effect that a general law regulating divorces for cause, is within the province of state legislation, and such is the opinion of Justice Story. He says, in that case, that a general law regulating divorces, was not necessarily a law impairing the obligations of such a contract; and that a law punishing the breach of a contract by imposing a forfeiture of the rights acquired under it, or absolving it, because the marital obligations were no longer observed, was not a law impairing the obligation of contracts, while at the same time he declared that he was not prepared to admit a power in the state Legislature to dissolve the marriage contract without any cause or default, and against the wishes of the parties, and without a judicial inquiry to ascertain the breach of the contract. It cannot be denied that while the marriage relation is said to be a civil contract between the parties, it is not a contract in the full common law sense of the term. It is from the Romans, from whence we have derived the civil law, that the idea has prevailed that marriage was a civil contract. It was, however, with them a contract without much of an obligation, as the continuance of the relation depended almost wholly upon the caprice of one or the other of the parties. (2d Kent's Com. 85, 3d ed.; Notes to Cooper's Justinian, 437, 438.) Marriage is a civil institution established for great public objects. It is defined to be a contract between a man and a woman for the procreation and education of children. (Bacon's Abr., tit. Baron and Feme, letter A.) And it has a similar definition in the civil law. (Cooper's Justinian, 419.) It is wanting in many of the essential ingredients of a contract, and is regulated more upon grounds of public policy to accomplish the great objects of such a relation, than it is with reference to the pecuniary rights of the parties as it regards each other; unlike other contracts at the common law, the parties may enter into it, the male at the age of 14 and the female at the age of 12 years. It cannot, like ordinary contracts, be dissolved by mutual agreement, or cancelled upon a valuable consideration. Neither can its obligations be modified by the parties. The will of society and public policy supersedes the will of the parties; and, however unable one of the parties may subsequently become to perform the obligations resulting from the relation, the other is still bound. Not even a total overthrow of all the mental powers, terminating in fixed and permanent insanity, is permitted to operate as a discharge of the other party



from its obligations. And the very creation of this relation dissolves all previous contracts between the parties, and produces a total incapacity to enter into other contracts between themselves. In fact, almost the only essential features of a contract it possesses, is, that the assent of the parties is necessary to create the relation, and it can not be alleged that the mere consent of the parties to establish a certain relation in society between them, necessarily makes the transaction between them a contract. If this were so, the relation of guardian and ward, whenever the ward chooses the guardian, would be the result of a contract, and consequently, beyond the control of state legislation. Without further consideration of this branch of the case, I will conclude by saying, that in my opinion, the marriage relation is not created by what we understand to be a contract in the strict common law sense of that term, and is not in what popular language and common parlance, we understand by the word contract; and it is not a contract within the spirit and meaning of this prohibitory clause of the Constitution of the United States. It follows, therefore, that there is nothing in the Constitution of the United States which invalidates the statute under consideration, for there is nothing in that which prohibits a state Legislature from taking away vested rights, unless they arise out of contract. This was expressly adjudged in the case of *Watson v. Mercer*, 8 Peters' R. 88.

The next question which I propose to consider, is, does the statute under consideration violate the first section of article one of the constitution of this state, which is as follows: "No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers." The defendant in this suit, by virtue of the marriage contract with the plaintiff, became seized of a freehold estate in this farm. He not only succeeded to rights of property, but became actually seized of the freehold, *jure uxoris*, and entitled to take the rents and profits, during their joint lives in any event, and as there were children born alive of the marriage, he took an absolute freehold estate for life as tenant by the courtesy. (2 Kent's Com. 130, 131, 2d ed.; *Adair and others v. Scott*, 3 Hill R. 182.) This section, one of article one, of the present constitution, is but a copy of section one of article seven of the former constitution of the state, and has received judicial construction. The question arose in the case of *Taylor v. Porter & Ford*, (4 Hill R. 140,) as to the validity of a general statute of the state authorizing private roads to be laid out over the lands of the owners thereof, for the use of the applicant, his heirs and assigns, and the act of the Legislature was judged to be unconstitutional, as coming

in conflict with this section of the constitution. And we must regard this section of the constitution as having received judicial construction: "No member of this state shall be disfranchised or deprived of any of the rights and privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers." The court in the case of *Taylor v. Porter & Ford*, in considering the expression "by the law of the land," contained in this section, use the following language: "The words *by the law of the land*, as here used, do not mean a statute passed for the purpose of working the wrong; that construction would render the restriction absolutely nugatory and turn this part of the constitution into mere nonsense. The people would be made to say to the two houses, you shall be vested with the legislative power of the state, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose; in other words you shall not do wrong unless you choose to do it." Again, says the court in that case, "the meaning of the section then seems to be, that no member of this state shall be disfranchised or deprived of any of his rights or privileges, unless the matter shall be adjudged against him upon trial had according to the course of the common law. It must be ascertained judicially that he has forfeited his privileges, that some one else has a superior title to the property he possesses before either of them can be taken from him. It can not be done by mere legislation." The same principle was adjudged at an earlier day in the matter of *Albany Street*, 11 W. R. 149. This principle is again recognized in the case of *Bloodgood v. M. and H. Railroad Company*, 18 W. R. 9. But again it seems to me that this act of the Legislature must be adjudged void as contravening the 6th section of article one of the constitution of this state, which is as follows: "No person shall be subject to be twice put in jeopardy for the same offence, nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation." (Art. 1st, sec. 6th, Const.) This is an exact copy of a part of the 7th section of article 7, of the former constitution of this state, and the expression "nor be deprived of life, liberty, or property, without due process of law," received judicial construction in the case of *Taylor v. Porter & Ford*, *supra*, and the court in commenting upon this part of the section say, "the words due process of law in this place can not mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt or determining the title to property. It will be seen that the same measure of protection

against legislative encroachment is extended to life, liberty and property, and if the latter can be taken without a forensic trial and judgment there is no security for others. If the Legislature can take the property of A, and transfer it to B, they can take A, himself, and either shut him up in prison or put him to death. But none of these things can be done by mere legislation; there must be "due process of law." These same provisions of the present constitution were again considered by this court in the case of *Gilbert v. Foote*, in which case the court declared the statute entitled "of proceedings for the draining of swamps, marshes, and other low lands," (2 R. S. 548,) unconstitutional. The case went to the Court of Appeals and was affirmed by default in that court at the last January term thereof—the court deciding that as the statute authorized the taking of the property of the owner of the land and transferring it to the applicant, his heirs and assigns, for the ditch, against the consent of the owner, it was in conflict with the provisions of the constitution above referred to, and consequently void. This case has not as yet been reported. I think that Senator Tracy was right in the case of *Bloodgood against The Mohawk & Hudson Railroad Company*, 18 W. R. 59, when he said that the latter clause of the section of the former constitution, "nor shall private property be taken for public use without just compensation, as equivalent to a constitutional declaration that private property without the consent of the owner shall be taken only for the public use, and then upon a just compensation." The decision of this case was made in 1887, and the case of *Taylor v. Porter & Ford*, 4 Hill's R. 440, was decided in 1843, in which this general statute of the state was declared to be an infraction of this provision of the constitution, and the principle decided in these cases was well understood by the framers of the present constitution, and they must have appreciated the full force of the decision in the latter case, and have provided by section 7, article 1, of the present constitution, that so far as private roads are concerned they may be opened in the manner to be prescribed by law, but have not extended the right to take private property for private use beyond the case of opening private roads and from the very fact that they have not, I think the inference is irresistible that they did not intend it should be done. But again, I am not prepared to admit that the Legislature of a state possesses any such power as would authorize them to take the property of one person and give it to another against the consent of the owner, were there no such prohibitions contained in the constitution. It has been said that the British Parliament was omnipotent, but the great commentator upon the Laws of England seems to think that when they speak of the omnipotence of Parliament

they use a figure of speech rather too bold. (1 Black. Com. 161.) But this omnipotence of Parliament signified nothing more than the supreme sovereign power of the State, and I think, therefore, that De Lolme made an unwarrantable assertion when he said that "it is a fundamental principle with the English lawyers that Parliament can do every thing but make a woman a man and a man a woman." The Legislature, however, is not supreme under our form of government. It is only one of the organs of the absolute sovereignty which resides in the whole body of the people. (4 Hill's R. 144.) It was said by the late Justice Story, in the case of *Wilkinson v. Leland et al.*, 2 Peters' R. 657, "that a government can scarcely be deemed to be free when the rights of property are left solely dependent on the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred." Again, he says, "we know of no case in which a legislative act to transfer the property of A. to B., without his consent, has ever been held a constitutional exercise of legislative power in any state of the Union. On the contrary, it has constantly been resisted, as inconsistent with first principles, by every judicial tribunal in which it has been attempted to be enforced." I maintain, therefore, that the security of the citizen against such arbitrary legislation rests upon the broader and more solid ground of natural rights, and is not wholly dependent upon these negatives upon the legislative power contained in the constitution. It can never be admitted as a just attribute of sovereignty in a government to take the property of one subject and bestow it upon another. The exercise of such a power is incompatible with the nature and objects of all governments, and is destructive to the great end and aim for which government is instituted, and is subversive of the fundamental principles upon which all free governments are organized. This was a power repudiated by the Romans during the whole reign of imperial despotism, and has ever been a maxim of the civil law, and was asserted in England as one of the sovereign rights of the citizen, and forms a part of the 29th chapter of Magna Charta. And I do not hesitate, in conclusion, to declare that the people of the state of New York have never delegated to their Legislature the power to divest the vested rights of property, legally acquired by any citizen of the State, and transfer them to another against the will of the owner. The Legislature of this State can only lawfully exercise such powers as have been confided to it by the sovereign will of the people, and when it usurps powers not entrusted to it by the sovereign power, its acts are as utterly void as those of the most inferior magistrate in the land,

in case where he has transcended his jurisdiction. It follows, therefore, that this act of the Legislature under which the plaintiff has sought the relief claimed in this case is void, and, consequently, can confer no rights upon her. I have not, in declaring the deliberate judgment which I entertain in this case, been unmindful of the importance and delicacy of the duties devolving upon this court. We are called upon to declare an important statute of the State unconstitutional and void; a statute deeply affecting the most important and delicate of the marital rights; a statute, it is said, passed to repeal the common law and substitute the civil in its stead; a law called for, it is alleged, by the popular voice of the State, and demanded by the onward progress of society. In a case like this, the court can never find a motive to transcend its duty, and I trust it will always be found to possess independence enough to do that. The defendant must have judgment upon the demurrer in this cause.

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## SUPREME COURT.

### ANONYMOUS.

*March, 1849.*—This was a motion by defendant to set aside a judgment and subsequent proceedings for *irregularity* merely. The *capias* was returned as though personally served on the defendant, (in August, 1848,) by the sheriff; although it appeared that, in fact, it was not served on him at all, but, if served, was on the wrong person. The proceedings were all regular, on the part of the plaintiff, to obtain judgment. There was no affidavit of merits; nor any collusion shown between the plaintiff and the sheriff or his deputy.

WILLARD, Justice, held that, as between the plaintiff and defendant, the judgment was regular, and there being no affidavit of merits, it could not be disturbed. The return of the sheriff to the *capias* was matter of record, and could not be impeached in that collateral way, especially where there was no pretence of fraud or collusion. (See *Evans v. Parker*, 20 Wend. 622; *Baker v. McDuffie*, 23 Ib. 289; *Mentz v. Hanman*, 5 Whart. 150.) Motion denied, with \$10 costs.

## SUPREME COURT.

JUAN M. PICABIA agt. FRANCIS EVERARD, PETER DELMONICO, adm'r,  
and others.

A final decree regularly entered (not enrolled) cannot be corrected on *special motion*; it must be done on a *re-hearing*. If enrolled, it must be by bill of review.

The court will not suffer the plaintiff to dismiss his bill after a decree, *unless upon consent*. (1 Barb. Ch. R. 228; 1 Dan. Ch. Pr. 930; *Lashley v. Hogg*, 11 Vesey, 602; *Gilbert v. Faukes*, 2 Freem. 158; *Anon.* 11 Ves. 169.)

*New York Special Term, Oct. 1849.*—The defendant, Delmonico, as administrator, &c., presented a petition setting forth that he was the owner, by assignment from the plaintiff, of the mortgage to foreclose which this suit had been brought; that in 1844 a decree had been entered in the suit by default, but it had not yet been enrolled; that the premises were liable to three prior mortgages, one to Bishop Hughes for \$24,000, and two to John Targee for some \$10,000; and that there was due on the mortgage in this suit about \$14,000; that the premises would not sell for more than \$40,000, which would not be sufficient to satisfy all the mortgages; and that if the premises were sold subject to the prior mortgages, (as they must be, as neither the Bishop or Targee had been made parties,) they would not sell for the amount due the petitioner; that he had been informed that more than \$10,000 had been paid on the Bishop's mortgage, though it stood on the record in full force for its whole amount, and that no purchaser would take the risk that the premises were not liable for such full amount.

A sale of the property being necessary, the petitioner asked for leave to amend his bill, which had been taken *pro confesso* as to all the defendants, by inserting his own name as plaintiff instead of defendant, and by making the Bishop and Targee parties, with such averments as would enable the final decree to settle the amount due to them respectively, or for leave to vacate the decree of foreclosure and dismiss this suit, or for other relief, &c. Notice of the motion had been given to the older mortgagees, and to the owners of the equity of redemption.

H. H. STUART, *for petitioner.*

E. SANDFORD, *for one of the defendants, who, as trustee, had executed the mortgage.*

J. T. DOYLE, *for the Transfiguration Church, who, as cestui que trusts, were owners of the equity of redemption.*

EDMONDS, Justice.—A final decree, regularly obtained and enrolled,  
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cannot be opened or altered in this court, but on a bill of review; and if not enrolled, but regularly obtained and entered on the minutes, it can be corrected only on a re-hearing, (*Bennett v. Winter*, 2 J. C. R. 205;) and in the latter case, the court will not, on motion, entertain an application to vary it, unless by consent of all parties, or in respect of matters which are quite of course, as in case of a clear mistake in the counsel's drawing it up, (1 Paige, 189; 7 ib. 382,) or where some ordinary direction has been omitted, (1 Russ, 475; 4 J. C. R. 546,) or where costs have, by inadvertence, been given to a party not entitled to them (2 Wend. 221;) but except in matters of form or clerical errors, or where the matter is clearly consequential on the directions already given, it is a principle of the court, which it would be unsafe to depart from, that no alteration can be made in a decree on special motion. It would, therefore, in my opinion, be improper to grant the motion to amend.

Nor is the other branch of the petitioner's application without its difficulties. He very naturally asks, why the court should refuse to let a man discontinue a suit in his own favor, even after he has got a judgment? But several quite cogent reasons suggest themselves in answer to the question.

Where a bill is dismissed by order of the court, it is a bar to another suit; but where it is voluntarily dismissed by the plaintiff himself, he may sue again. To establish a precedent which should give the plaintiff this right especially after decree, might be made to operate vexatiously and oppressively. Every decree affects other rights besides those of the plaintiffs. All parties become interested in it, and any of them may take steps to have the effect of it. (*Carrington v. Holly*, 1 Dickens' R. 281.)

In this very case the question may arise, whether Burke, one of the trustees who executed the mortgage, is not personally liable for any deficiency. Such personal liability may not have been decreed in this case, yet, by allowing a new suit, he may be subjected to a litigation on that point. This would not be just to him without his consent, and therefore it was that I inquired on the hearing whether the petitioner would take a dismissal of the suit, with a stipulation waiving his personal liability, to this I understood Burke to consent; but the petitioner very properly replied, that as administrator, he had no authority to make such an arrangement, and so Burke persists in his opposition to the motion.

Now, I understand it to be a rule of this court, not to suffer a plaintiff to dismiss his bill after a decree, unless upon consent. (1 Barb. Ch. Pr. 228; 1 Dan. Ch. Pr. 930; *Lashley v. Hogg*, 11 Vesey, 602; *Gilbert v. Faules*, 2 Freem. 158; *Anon.* 11 Ves. 169.)

I do not, then, well see how I can grant this part of the motion even, without establishing a precedent which may be fraught with much mischief. It is true that I do not see the prospect of doing much mischief in this particular case, for except as to Burke and his co-trustees; it does not seem to be a matter of any consequence to any of the parties; and as to them, their liability may be already established; for as the decree is not before me, I do not know how that is. But it is the danger of the precedent which affects me, and I do not therefore look so clearly as I otherwise should into their exact position.

The petitioner, however, is not without all remedy. He may himself become the purchaser on his mortgage sale, and then contest with Bishop Hughes the amount due to him; or he may offer to redeem from him, and it has occurred to me that perhaps he may get rid of the decree, by obtaining a re-hearing. (*Gardner v. Dering*, 2 Edw. 181; *Clarke v. Hall*, 7 Paige, 382.)

Be that, however, as it may, I can not feel myself at liberty on this motion to grant the petitioner either of the forms of relief which he asks.

The motion must be denied, but without costs.

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## SUPREME COURT.

HENRY MIER agt. CARTLEDGE & FERGUSON.

Although it is a settled rule that a pleading will not be stricken out on motion as false, where it is verified by the oath of the party according to the rules and practice of the court, (because the court will not try the matter upon affidavits, 1 Hill, 370.) Yet, where the court can plainly see, from the pleading, that a new and equivocal formula and unaccustomed words are averred, instead of the usual and proper language, to form an issue, by which it is quite clear that a real issue upon the facts is not produced, and evidently was not intended, it is a duty to hold such a pleading not within the rule.

*New York Special Term, Oct. 1849.*—The complaint was on two drafts on, and accepted by, the defendants.

The defendant Ferguson pleaded, that "he denies that the defendants in said complaint mentioned, did as therein alleged, accept the drafts in said complaint mentioned, or either of them;" which was verified as required by the code.

C. EDWARDS, *for plaintiff*, moved to strike out the answer, as a sham



defence, on affidavits which set out that the drafts had been accepted by the defendants' agent for debts owing by the defendants to the plaintiff; that after they had been dishonored, the defendants had repeatedly promised the plaintiff's agent to settle the matter of the drafts, never intimating a question as to their liability on them; and had three several times written to the plaintiff in England, where he resides, recognizing their liability, expressing regrets that they had been obliged to permit their acceptances to be dishonored, proposing terms of payment, and asking for indulgence, and uttering threats in case they were coerced.

E. PAINE, *for defendants*, read no affidavits, but relied upon the facts that the answer had been verified, and that it amounted to the general issue; which had never been stricken out as a false plea.

EDMONDS, Justice—The practice of striking out a plea as false, has for some time prevailed in this court, and is founded on the same considerations which lay at the foundation of the practice of striking out frivolous pleas; the delay, namely, which was generally the object of such a mode of pleading, and which it is the duty of the court to guard against.

But there have been two exceptions to the rule: one was that of the general issue; and the other, that of a plea when verified by the oath of the party. The former exception is not now applicable, because under the code of practice, we no longer have any general issue but the latter, I apprehend, is still applicable.

The court have held, that when a plea was verified under the rules adopted pursuant to the act of 1840, to wit, that "the defendant believes it to be true in substance and matter of fact," it could not be stricken out as false, because the court could not try the matter upon affidavits. (*Maury v. Van Arnum*, 1 Hill's R. 370.)

Such pleadings are now to be verified more strongly than was required by the rules of 1840; and accordingly the answer in this case is verified by the defendants' oath, that "it is true of his own knowledge."

The answer, however, is justly subject to some criticism. It does not say that the defendants did not accept the drafts, which is the true mode of pleading, according to all well-established rules; but it says that the defendant denies that the drafts were accepted, &c.; so that when the verification says that the answer is true of defendant's own knowledge, it may mean that the fact which is thus sworn to be true is the fact that defendant denies the acceptance, and not the fact that the drafts were not accepted.

Again, the answer denies that they were accepted, "as in the complaint alleged." The complaint alleges that they were accepted by the defend-

ants, and the affidavits show that they were accepted by their authorized agent. Such a mode of declaring is right enough, and the plaintiff may sustain his averment by proof of an acceptance by an agent; yet the answer is so expressed, especially when taken in connection with the affidavit, as to mean merely to deny that the defendants personally themselves accepted; so that the answer and verification may be true; and yet the defendants be bound beyond all question as acceptors of the drafts.

If the answer had pursued in this respect the usual and proper language, instead of adopting a new and somewhat equivocal formula, and in accustomed words had averred that the defendants did not accept in manner and form, &c., then the verification would have brought this case within the exception, and placed the court in the position that it ought not to settle the question of the truth or falsehood of the answer on affidavits; but it has used language which may convey an idea quite different from that precise one which could alone have that effect.

I fully accord with the sentiments uttered by this court on a former occasion, (*Broome County Bank v. Lewis*, 18 Wend. 566,) that the propriety of exercising this power (that, namely, of striking out sham and false pleas) is manifest from the consideration that it is unbecoming the dignity of courts of law, unfit and improper in itself, and unjust to other suitors, that courts should be compelled to examine and decide questions which have no foundation in the facts of the case; and that it would be a reproach to the administration of justice, if delays could be procured by what may properly be denominated frauds upon the right of pleading; and I am therefore disposed to be strict in examining pleadings where there is ground to suspect that a defence is put in for delay, rather than for the legitimate purpose of procuring a judicial determination.

In this case, though the defendant is put upon his guard by the affidavits which have been served upon him, and his attention has thus been called to the allegation that his answer is false and a sham, and to the facts by which that allegation is sought to be established, yet he has made no answer whatever, has made no explanation of the facts alleged against his good faith, and has manifested none of that anxiety which is so natural where one has an actual defence, and is possessed of a sincere desire to have it properly presented to the court. In three of their letters to the plaintiff, the defendants never intimated any objection to the claim which the plaintiff sets up upon these drafts. In one of them, they express their regret that their acceptance came back, and apologize for it. This was after the first one and before the second one became due; and they promise to remit as soon as possible, and attempt to quiet the plain-

tiff by an assurance that he will get full interest on his claim. In their second letter they promise to secure the plaintiff's debt, and possibly make payment in good business paper; and in one of them they threaten those who shall place themselves in a hostile attitude, and boast that they never fight but they win!

If these letters relate to any other transactions than these drafts, it was indeed very easy for the defendants to explain them away: they have had the opportunity, and remain silent. The inference from that silence is very strong; and when it is considered that the first of the letters speaks in terms of the acceptance, and the last one was handed to the plaintiff's agent as their answer to a demand by him for payment of the drafts, becomes quite irresistible that they have no defence in fact.

When to this are added the facts that the plaintiff's agent called on defendants for payment of these drafts in July, 1848, and several times between that and the 13th September following, and again in March, April and May, 1849, and had conversations with them in regard to them, in none of which did they intimate any question as to their acceptance, but repeatedly promised a settlement, until they finally stopped payment, it appears to me that the conclusion against the *bona fides* of their answer is too strong to be disregarded.

Still I may be wrong in this inference; and the danger of that admonishes me that in this, as well as in other like cases, the court ought to be very cautious in exercising the power of depriving a party of all opportunity of making a defence against a claim upon him.

While, therefore, I am constrained by the aspect in which this case presents itself to me, to hold that the defence set up in the answer is a sham defence, I am inclined to think that that ought to be without prejudice to the defendants' hereafter applying to the court for leave to put in an answer, when they can satisfy the court that they have a defence in fact, and desire in good faith to avail themselves of it.

With this reservation, the motion will be granted with costs.

## SUPREME COURT.

ELIJAH SHAW agt. AUSTIN S. JAYNE and MORRIS BROWN.

By a statement of facts constituting the cause of action, in a complaint, under the 142 section of the code, it is not intended that the evidence upon which the recovery is to be had, nor the circumstances in detail, which, when taken together will justify the conclusion that a wrong has been committed, or that a cause exists for which an action can be maintained, should be stated. It is not true under the new order of things any more than under the old, that a pleading may contain the *evidence or the circumstances of the case in detail*.

Thus, where the complaint, in an action for false imprisonment, stated at great length all the circumstances, and the particular instrumentality by which the plaintiff was restrained of his liberty, *held*, that it should all be stricken out. The mode of stating a cause of action heretofore in use in such a case, is all that is necessary.

*Before WELLES, Justice, at chambers, Sept. 1849.*—Motion on the part of the defendants to strike out certain portions of the complaint as being redundant and irrelevant.

The action is for false imprisonment. The complaint states, upon information and belief, that on or about the 5th day of February, 1849, the defendant, Morris Brown, issued and delivered to one Samuel R. Tuell, a deputy of the sheriff of the county of Steuben, an execution signed by said Brown, as attorney for Austin S. Jayne, the other defendant, which execution is in the words and figures following, that is to say: [The execution is then set forth *in hæc verba*, which is against the body of the plaintiff, to collect \$79.84 costs in an action of ejectment, at the suit of the plaintiff Jayne.] The complaint then proceeds to state the arrest of the plaintiff by said Tuell as such deputy, by virtue of such execution, and his commitment to Daniel W. Wheeler, a deputy of the sheriff, and the keeper of the jail, &c., and the delivery of the execution to said Wheeler; that Wheeler imprisoned the plaintiff for the space of three days, before the plaintiff could procure sureties to the usual bond to the sheriff, &c., to obtain the liberties of the jail limits; that on the 10th day of February 1849, the plaintiff, with Orrin Grimes and Harlow L. Comstock as sureties, &c., executed and delivered to Wheeler, a bond to the sheriff, according to the provisions of article third of title seven, of chapter seven, of part third of the Revised Statutes; and that thereupon the plaintiff was allowed the liberties of the jail limits. &c., but was kept and detained as a prisoner upon the said jail limits by virtue of the said execution, and against his will, until the sixteenth day of February, 1849, when he was discharged therefrom; that the action

mentioned and referred to in the execution was commenced on the fifth day of July, 1848, and was brought by said Jayne, to recover possession of certain premises then occupied by Shaw, in Urbana, in said county, in which defendant Brown was attorney for Jayne, and that Brown issued the execution as attorney for Jayne; that judgment was entered in the action in favor of Jayne against Shaw, on the fifth day of February, 1849, for the recovery of certain of the said premises, and also \$79.84 costs, &c.; that the execution was issued to enforce the collection of the judgment for costs.

The complaint then states the issuing of another execution on the judgment, about the 6th day of February, 1849, and the delivery of the same to said Tuell, &c., to recover possession of the premises, &c.; and that Tuell, by virtue thereof, on the said 6th day of February, 1849, delivered to Jayne that part of the dwelling-house on said premises which was then occupied by Shaw, and also the shed and north part of the premises near said house.

The plaintiff is informed and believes, that on the 10th day of March, 1849, at a special term of this court, held at Bath, Steuben county, before, &c., one, &c., the judgment and all subsequent proceedings in the action were set aside for irregularity, on condition that Shaw should within ten days stipulate not to bring an action against the plaintiff in the action, or his attorney, for issuing the said execution, for the delivery of the possession of the premises, &c.; that on the 16th day of March, the plaintiff stipulated accordingly, setting forth the stipulation at length; that he requested Jacob Larowe, one of his attorneys to deliver the stipulation to said Brown, and is informed and believes, he did so deliver it, together with a copy of the order; that no execution against the property of Shaw, on said judgment, had been issued or returned previous to the issuing of the execution against his person. That plaintiff is informed and believes, that the defendant Jayne knew of, and consented to, the issuing of the first-mentioned execution, and knew of, and approved of the arrest and imprisonment of the plaintiff. The complaint then concludes with a claim of damage to \$1000.

The motion is to strike out of the complaint the execution against the body of the plaintiff, as set forth at length; also the allegation of the plaintiff, giving sureties to the sheriff for the jail limits; also the allegation of issuing of the execution to put the said Jayne in possession of the premises, and the execution thereof, &c.; also all that is stated about setting aside the judgment by the special term, &c., and the stipulation, and the delivery thereof to Brown, &c.

The motion was heard at chambers, to accommodate the counsel, under a stipulation to have the order to be made, entered as of the last special term in Steuben county.

M. BROWN, *for defendants.*

H. L. COMSTOCK, *for plaintiff.*

WELLES, Justice.—Much as I deplore the spirit of innovation, which, for the last two sessions has seemed to govern the counsels of our Legislature on the subject of legal practice and pleading, I will not do them the injustice to believe that they ever intended to countenance such a form of pleading, in a simple action at law, as is here presented. The above statement of matters contained in the complaint is very much abbreviated, and yet enough appears to show that it contains all the ingredients of a bill of discovery. It is sworn to, and consequently the answer would have to be put in under oath; and what is not specially denied, will be deemed admitted. The 142d section of the amended code defines what a complaint shall contain. The second subdivision of that section is as follows: "A statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended."

By a statement of facts constituting the cause of action, is not meant the evidence upon which the recovery is to be had; nor the circumstances in detail, which, when taken together, will justify the conclusion that a wrong has been committed, or that a cause exists for which an action can be maintained. The mode of stating the cause of action heretofore in use in a case like the present, is all that is necessary. It is not true, under the new order of things any more than under the old, that a pleading may contain the evidence or the circumstances of the case in detail.

It never was necessary, in an action for false imprisonment, to set forth in the declaration, the particular instrumentality by which the plaintiff was restrained of his liberty. A large portion of the cases in practice were where the unlawful imprisonment was through or by means of process of some kind issued by courts, and the point of the complaint, the irregularity of the proceedings, or the want of power in the officer granting the process. This want of power might be owing to a great variety of causes in the various cases that arose; and yet I believe the old obnoxious practice was never charged with the absurdity of requiring the plaintiff in any such case to give a history, in his declaration, of the facts and circumstances which he intended to prove

on the trial. Much less should the reformed practice, which aims to rebuke the prolixity and circumlocution of ancient form and proceedings, be chargeable with the same vice in a fourfold degree. If the complaint or answer is founded upon *equitable principles*, it would be doubtless proper sometimes to set forth the facts and circumstances much more at length, than is necessary in a case depending, like the present, upon common law principles only. It is a mistake to suppose that the distinction between law and equity is abolished: it is only the distinction of actions that is abolished. The common law remains as much the standard of civil rights as ever, and is the great rule of action for the citizen. Equity is, as it always was, ancillary to the common law, and is never to be invoked excepting where the rules of law are found inadequate to afford such relief as the peculiar circumstances of particular cases demand.

The statement of the cause of action in the complaint will always disclose the character of the action, whether resting upon principles of law or rules in equity, and the pleader should adapt the form or mode of his statement to the class to which the case belongs; taking care, in each case, that it be "in concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended."

If, in the present case, the imprisonment complained of was the immediate effect of the act of the jailer, in receiving and detaining in custody the plaintiff, from a deputy sheriff who made the arrest by virtue of an irregular execution issued by the defendant Brown, for and with the approbation of the defendant Jayne, upon an irregular judgment which was afterwards set aside, the imprisonment was, after all the act of the defendants, and should have been so stated at once. The great merit of the new regime is brevity; and it would be a sad commentary upon it, if a rule of construction is adopted involving interminable prolixity and leading to a multitude of issues. I suppose it would be sufficient in this case for the complaint to state, "that the defendants on &c., at &c., unlawfully seized and took the plaintiff by his body, and compelled him to go from a certain dwelling-house in the town of Urbana, in the county of Steuben, through divers roads and highways, to the common jail in the county of Steuben, and there imprisoned him against his will for the space of ten days, to the great damage of the plaintiff," and demanding judgment for \$1000.

Under such or a similar complaint, the plaintiff could give in evidence all the circumstances stated in the complaint in this case, provided they were competent under any form of stating the case.

I regard the whole frame of the complaint in the present case wrong;

and if the motion had been made to strike it all out, it would have been granted. The notice of motion, however, is to strike out certain parts, and is not in the alternative; and I can do no more than grant the motion as asked for in the notice. This is done with leave to the plaintiff to amend, and to substitute a new complaint, if he shall be so advised, for the same cause of action; such amendment to be made in twenty days after service of a copy of the order to be entered upon this decision. No costs to either party as against the other. The defendants to have twenty days to answer such amended complaint, in case one is served within the time above limited; and the same time to answer the complaint as it shall stand upon striking out the matters as provided in said order, after the plaintiff shall give notice in writing that he elects not to amend further.

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## SUPREME COURT.

DODD agt. CURRY.

A fee of \$12, for the trial of a cause is allowable in an action at issue, where the plaintiff fails to appear when the cause is called upon the calendar and the defendant takes an order that the complaint be dismissed.

*Question of Costs referred by the Clerk of Oneida County, for advice.*—This was an action brought under the Code of Procedure, for an assault and battery. The cause was noticed for trial by both parties, and was on the calendar at the late Oneida Circuit. On a regular call of the calendar, the cause was reached on the first day; and the plaintiff not appearing, the defendant's attorney read his notice and proof of service, and took an order that the complaint be dismissed, pursuant to the 258th section of the code. Upon the adjustment of the costs, the plaintiff's counsel objected to the item of twelve dollars for the trial of the cause.

Mr. MOREHOUSE, *for the plaintiff.*

Mr. HURD, *for the defendant.*

GRIDLEY, Justice.—It is argued by the counsel for the plaintiff, that a trial being, according to the definition contained in the 252d section of the code, "*a judicial examination of the issues,*" and there having been no examination of the issues, there has been no trial, and of course the trial fee is not allowable.

I apprehend, however, that the definition of a trial, so far as an issue of



fact is concerned, is merely declaratory of the existing law. Blackstone defines a trial, "as the examination of *the matter of fact in issue*," (3d vol. p. 330.) It is true that the code includes the examination of issues of law as well as of fact, within the definitions contained in the section before cited, so that what was formerly an "argument," or "hearing," is now a trial. This is the only difference between a trial under the code, and under the former system of practice. (See the Commissioner's Report, p. 184.)

It cannot be maintained that there is, in the mode prescribed by the code for obtaining a dismissal of the complaint, an *actual* examination of the issues. But the cause is put on the calendar for trial, it is called by the judge; and the plaintiff not being present to maintain the issue on his part, the judge, on due proof of the service of notice of trial by the defendant, orders the complaint to be dismissed, as though the plaintiff had appeared and produced his witnesses, and failed to prove his case. It is final disposition of the cause; and though not technically a trial, it has always been held, for the purposes of costs, equivalent to an actual trial. Under the old system, when a cause was placed on the calendar of the court of chancery, the defendant's solicitor was entitled to take an order dismissing the bill of complaint, on the reading of his notice and proof of service, precisely as the defendant's counsel did in this case; but it was never doubted that the counsel was entitled to his fee of \$8, for arguing the cause. So, too, the counsel fee was universally taxed in the Supreme Court, when the counsel took judgment by default on proof of service of notice of argument. And yet in neither case was there any actual examination of the issues; but the party who failed to appear, virtually conceded that he could not maintain them on his part. The court, so far from giving a strict construction to the fee bill, have sometimes gone to the very verge of judicial legislation. They have allowed to the attorney the fee for "*attending the trial of a cause*," and for "*arguing a demurrer, &c.*," when the attorney did not in fact perform the service, and was not in fact present at the court, (2 W. R. 265; 19 W. R. 127.) In the case under consideration, however, the allowance of a fee for a trial of the cause is within the spirit and true meaning of the act. The disposition of the case, when called on the calendar, by its final dismissal, is in pursuance of a notice of trial and is for all the purposes of this question equivalent to an actual trial. It would be oppressive upon the successful party, if a plaintiff after having noticed a cause, could, by omitting to appear when the cause was moved, deprive his adversary of a trial fee which he had been obliged to incur to the counsel who moved the cause. Upon principle and authority, therefore, I think the charge should be allowed.

## SUPREME COURT.

STEPHEN REED and others agt. MARY CHILD and others.

In proceedings by petition for partition, under 2 R. S. 316, the pleadings are intended to be like those in a personal action, in which the petition shall stand for a declaration, and any thing may be pleaded which will abate the action, or bar the petitioner's right to a judgment.

*New York Special Term, October, 1849*—Stephen Reed and others filed their petition under the statute (2 R. S. 316,) praying for partition of certain lands, and in it averred that partition of the same premises had been made among the parties in a suit in chancery, by a decree entered in 1845, that a bill of review was afterwards filed, and such proceedings thereon had; that in 1849 a decree was entered, setting aside the former decree of partition, and claiming that thereupon the several parties were restored to their original position as tenants in common; whereupon partition was prayed, according to the rights of the parties as set out in the petition.

To this petition, two of the defendants pleaded that they did not hold the premises in common with the petitioners, that their rights were not truly stated in the petition; and that an appeal had been taken from the above decree entered in 1849, which appeal was still undetermined.

REYNOLDS & JUDAH, *for the petitioners*, now moved to strike out the last plea as a frivolous and sham plea.

Mr. MARVIN, *contra*.

EDMONDS, Justice.—The allegation is that the 16th section of the statute (2 R. S. 320,) contains the only authority that is given for any pleading to the petition, and that that is confined to two defences, viz. that the petitioners were not in possession, and that the defendants did not hold the premises together with the petitioners, with a notice of such special matter as may sustain the last mentioned defence.

The proceeding being entirely a creature of the statute, if that section contained all the enactment there was on the subject of pleading in it, there might, perhaps, be force in the suggestion. But that is not so; section 15 allows any person, having an interest in the premises, to appear and answer to the petition "as to a declaration;" and section 17 enacts that replications and further proceedings may be had according to the practice of the court, as in personal actions, until an issue in law or fact may be joined.

Under the law as it stood before the Revised Statutes, it was doubtful

whether the right of the petitioner could be questioned; and there being no mode of enforcing the judgment in partition but by ejectment, it was deemed advisable to require the petitioners to be in possession, and section 16 was enacted to remedy these defects. It authorized the defendants to plead as to these two matters. It was intended for the purpose of opening to the defendant those two additional defences, and not to limit the pleadings to them. The pleadings were intended to be like those in a personal action, in which the petition should stand for a declaration, and anything might be pleaded which would abate the action or bar the petitioner's right to a judgment.

The defendants had then a right to plead the matters now objected to, and they may, perhaps, be a bar; for, if the decree in partition in 1845 yet stands effectual, this proceeding cannot be sustained. I can not, therefore, strike the plea out as frivolous or sham. The matters may not be properly pleaded to raise the question; or, if they are, they may not be a bar; but those are questions which I can not entertain on this motion. Advantage must be taken of those defects if they exist, by demurrer.

Motion denied, with costs.

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## SUPREME COURT.

JACOB LEVI agt. JONATHAN JAKEWAYS.

Under the 157th section of the code, *any* pleading verified by oath requires all subsequent pleadings thereto to be likewise verified, whether the complaint is verified or not. *It seems*, that a pleading served, which may be treated as a nullity, should be immediately returned.

### *Otsego Special Term.*

G. W. GRAY, on behalf of the defendant, moved for judgment (or "for such other relief," &c.,) on the ground that the reply was not verified, though the answer was.

H. BENNETT, *opposed*.

. GRIDLEY, Justice.—All the pleadings in this cause have been put in since the amended code took effect as a law. By the 157th section of that act, it is provided that "*when ANY pleading in a case shall be verified by affidavit, all subsequent pleadings (except demurrers) shall be verified also.*" It is argued that this rule only applies to a case in which the

complaint is verified. I do not think so. The language of the enactment will not admit of that construction ; nor does the reason on which the rule is founded require it. The defence may consist of entirely new matter ; and if this be verified, there is the same propriety in requiring the plaintiff to admit or deny it on oath, as there is in requiring a defendant to admit or deny a sworn complaint.

The reply, however, was not *returned* to the plaintiff ; and it would be very harsh to allow the defendant to treat it as a nullity, and have judgment, as he might do, under the 154th section, if no reply had been put in. It is possible that I should be justified in denying the motion altogether, under the decisions in 25th Wendell, 699, and 3d Howard's Sp. T. Rep. 64. But as it may be important to the defendant that he should not be deprived of the right which the code gave him to a reply made under the sanction of an oath, the order will direct that the reply be set aside, and that the plaintiff have 15 days within which to serve a reply duly verified. Under the circumstances, the plaintiff is not to be charged with any costs of the motion.

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## SUPREME COURT.

CLARKE agt. CRANDALL.

An *appeal* to the special term, on a bill of exceptions taken at the circuit, under the code, is irregular, *where the suit is commenced before the passage of the code*. There is no provision for such cases in the code. The bill of exceptions must be argued pursuant to the former practice, although judgment may have been entered.

*Otsego Special Term.*—The defendant regularly took exceptions at the trial of the cause, and the bill of exceptions had been duly sealed. The plaintiff had perfected judgment, and the defendant had brought an appeal. The suit was commenced before the enactment of the code, and the plaintiff moved to quash the appeal, on the ground of an alleged irregularity in the manner of bringing it, and the giving of security.

G. W. GRAY, *for the plaintiff*.

H. BENNETT, *for the defendant*.

GRIDLEY, Justice.—This motion was argued as though it were necessary to sustain the appeal, in order to enable the defendant to review the decisions made at the circuit on the bill of exceptions. The counsel of

both parties have mistaken the practice. It appears by the papers that the suit was commenced in 1846. No appeal lies in such a case. The code has no application to suits commenced before the time when it became a law, except so far as the "act to facilitate the determination of existing suits," has made certain sections applicable to that class of cases. And the provisions, relating to appeals from the decision of a single judge, are not among those sections. The cause is therefore to be heard on the bill of exceptions, without an appeal.

The judgment was probably entered under the mistaken idea that the decisions of the judge at the circuit could not otherwise be reviewed. The fact that judgment has been perfected in the cause, however, since the act of 1832, (Laws of 1832, chap. 123, sec. 1,) forms no obstacle to the argument of the exceptions. It is true that the judgment may be collected unless the proceedings are stayed, but subject to a restitution, if the verdict be set aside and a new trial granted.

The appeal having been irregularly brought was a nullity and must be set aside, but without costs to either party.

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## COURT OF APPEALS.

HENRY MCFARLAN, Respondent, against WILLIAM WATSON, Appellant.

*It seems, that under the code (§ 12) a remittitur, sending the proceedings to the court below, is not authorized on the dismissal of an appeal. It is to be made only in cases where the court give judgment (of affirmance or reversal, or any modification of the judgment or decree of the court below, as the cause may be,) upon the merits.*

*September Term, 1849.*—The appeal in this cause was from a judgment in the Superior Court of the city of New York, and from an order denying an application for a re-settlement of the bill of exceptions therein. The return of the Superior Court was filed April 11, 1849.

At the last July term of this court, a motion was made by the respondent, on notice, to dismiss the appeal, so far as it related to the order appealed from. The motion was granted, with costs of the appeal and of the motion. The remittitur, containing the entire return upon the appeal from the judgment as well as from the order appealed from, was thereupon sent to and filed in the office of the clerk of the Superior Court. The

respondent then gave notice to the appellant, requiring him to cause the proper return, upon the appeal from the judgment, to be filed with the clerk of this court within twenty days, or that he would be deemed to have waived the appeal. On the 11th day of September, upon affidavit of service of notice, and a certificate of the clerk that no return had been filed since the remittitur was sent to the clerk of the court below, the respondent entered a rule with the clerk of this court, dismissing the appeal for want of prosecution.

At this term, the appellant moved, upon notice, that the remittitur and order entered on the 11th of September be vacated.

SAMUEL BEARDSLEY, *counsel for appellant.*

THEODORE HINSDALE, *counsel for respondent.*

The court decided that the order of dismissal made at the July term, was not a *judgment* of the court, in the sense intended by the 12th section of the Code of Procedure, directing the clerk to remit the proceedings, and that the remittitur was therefore improperly made, until the appeal from the judgment had been disposed of. Motion granted.

## SUPREME COURT.

THOMAS SUFFERN, Appellant, agt. JOHN L. LAWRENCE, Adm'r. &c. of Isaac Lawrence, deceased, Respondent.

Where an appeal is taken from an order of the surrogate, and the petition of appeal is filed within the time prescribed by the rules of the court, (fifteen days) an application to the court under the former (83d) rule to dismiss the appeal, by a party whose interest is affected by the appeal, but who has not been made a party to the petition of appeal, must be made *upon notice*. That rule only authorizes an *ex parte* application to be made to dismiss, where the petition of appeal has not been filed in time (fifteen days); not where any of the proper parties have been omitted in the petition.

*New York Special Term, Nov. 1848.*—This was a motion to set aside an order dismissing the appeal in this cause. The appeal was from an order of the surrogate of New York, made on the 10th day of June, 1848, disallowing a claim of the appellant against the estate of Isaac Lawrence, deceased. The claim had been presented to the surrogate, in pursuance of a notice previously issued by him, of a further distribution of the proceeds of the real estate of the deceased; and requiring all persons having claims or demands against the estate, to exhibit them to

the surrogate at a time specified in the notice. The claim was contested before the surrogate by William Beach Lawrence, junior, who was the principal creditor of the estate. From this order an appeal was taken on the 8th of July, 1848, and within the time allowed by an order obtained for that purpose, a petition of appeal was filed, and a copy served upon the administrator of Isaac Lawrence, deceased, who alone in the petition of appeal was made respondent, and who duly answered the petition. On the 23d of September, 1848, William Beach Lawrence, junior, presented to the court, *ex parte*, a petition, stating that more than fifteen days had elapsed since the appeal was entered in the surrogate's court; that he had not been made a party to the petition of appeal filed in this court; that his interests were affected by the appeal filed with the surrogate; that he was a party to the proceedings before the surrogate; and praying that the appeal, so far as it affected his right, or stayed proceedings before the surrogate to his injury, might be dismissed with costs. An order was granted pursuant to the prayer of the petitioner.

W. C. NOYES, *for appellant*.

W. B. LAWRENCE, *for respondent*.

HARRIS, Justice.—The practice of this court requires notice of every application to be given to all the parties whose interest is to be affected by the determination of the question involved in such application. This is the general rule. (*Isnard v. Cazeaux*, 1 Paige, 39.) To this rule there are some exceptions. The 43d rule dispenses with such notices in the ordinary proceedings in a cause, where the defendant has not appeared therein. His omission to appear is to be regarded as a waiver of his right to notice of the proceedings against him. So the 83d rule provides, that upon an appeal from an order of a surrogate's court, if the appellant shall not within the time prescribed, file a petition of appeal, the appeal shall be considered as waived; and any party interested in the proceedings before the surrogate may thereupon apply to the court, *ex parte*, to dismiss the appeal with costs. It is under this rule that the regularity of the order of the 23d of September is sought to be defended; but I do not think the rule covers such a case. In *Halsey v. Van Amringe*, 4 Paige, 279, a motion was made, upon notice to the appellant, for leave to proceed before the surrogate, on the ground that the appeal had been waived by the omission of the appellant to file his petition of appeal within the fifteen days allowed by the rule for that purpose. The appellant was allowed to excuse his delay in filing the petition, and retain his appeal upon the

payment of the costs of the application. The chancellor, in deciding the question, says, "If such an appeal is deserted by the neglect of the appellant to file his petition of appeal in this court within the time prescribed by the rule; or if any person who would have been entitled to proceed on the sentence or order appealed from, if such appeal had not been entered, is not made a party to such petition of appeal by the usual prayer, that he may answer the same, the party whose proceedings are stayed must apply to this court for leave to proceed before the surrogate, notwithstanding the appeal. This case came before the court in December, 1833. In March following, the 118th rule, which corresponds with the present 83d rule, was amended so as to authorize any party interested in the proceedings in the court below to apply to the chancellor, *ex parte*; in case the petition of appeal is not filed within the time prescribed by the rule, to dismiss the appeal with costs. Until the adoption of this amendment, which took effect on the first of April 1834, it had never been the practice, in any case, to dismiss an appeal without notice to the appellant. The fact that an *ex parte* application is thus expressly authorized when the appeal is considered as waived by the omission of the appellant to file his petition of appeal, and that no such authority is given to a party whose interests are affected by the appeal, and who is not made a party to the appeal, shows, I think, that it was not intended to dispense with notice of the application when made upon the latter ground. The reason for such a distinction is obvious. In the one case the appellant may fairly be presumed to have abandoned his appeal. In the other, the fact that he has, in compliance with the rule, filed his petition, furnishes evidence of an intention to pursue it, though he may have erred in the selection of the proper persons to make parties to the proceeding. In such a case, he ought not to be precluded from amending his petition upon equitable terms.

There is a slight inaccuracy of expression in what the chancellor says in reference to the practice in such cases, in *Gardner v. Gardner*, 5 Paige, 170, which may have had the effect to mislead the party who obtained the order in question. In alluding to this inaccuracy, I shall, I am sure, be justified in saying that I do not recollect before to have met with a like instance in all the opinions of that distinguished equity judge. Accuracy in the use of terms, is characteristic of all his judicial writings; but in *Gardner v. Gardner*, which was a motion to dismiss an appeal, and which motion failed on the ground that the papers were not properly entitled, the chancellor takes occasion to say, that "if any party to the proceedings in the court below, whose interests are affected by the ap-



peal filed with the surrogate, is not made a party to a petition of appeal within fifteen days after the entering of the appeal in the court below, he may apply *ex parte* to dismiss the appeal as to him, with costs, so far as it stays the proceedings before the surrogate to his injury. The term "ex parte" has, I think inadvertently, been introduced into this remark, which would otherwise have been strictly correct. The learned chancellor does not seem for the moment to have distinguished between an application to dismiss an appeal for the omission of the appellant to file his petition, and an application by a party whose interests are affected by the appeal, for leave to proceed before the surrogate, notwithstanding the appeal, on the ground that though a petition of appeal may have been filed, he is not made a party in such petition. In that very case the motion was made upon notice; and it was denied without prejudice to the right of "*the respondents*," or any of them to renew the application.

I am inclined to think that the creditor upon whose application the order of the 23d of September was obtained, should have been made a party to the appeal. He appeared before the surrogate, and contested the appellant's claim. He was in fact the party chiefly interested in the question to be determined upon the appeal. I admit that it is not • easy, in every instance, to determine whether a party should, or should not, be made a respondent in an appeal from an order or decree of a surrogate. Indeed, in this very case, I do not see that the creditor would have had any difficulty in protecting his rights under the administrator as the respondent in the appeal; yet I think he had such an interest as entitled him to be made a party to the proceedings, (*Gilchrist v. Rea*, 9 Paige, 66.) However this may be, the order was irregular for want of notice to the appellant, and must, therefore, be set aside with costs to be paid by William Beach Lawrence, junior. He is to be at liberty, however, to renew his application upon notice. The respondent having died since the argument, the order upon this decision may be entered as of the time when the motion was made.

## SUPREME COURT.

LEWIS ROW agt. LEONARD ROW and others.

Notice of commissioners' proceedings in partition is not required, by statute, to be given to the parties. It would be proper, however, that the parties should have an opportunity to be heard before the commissioners, before making partition.

The case of *Traver v. Traver*, (3 Howard's Pr. 321,) commented upon and explained in relation to suits in partition under the code.—BARCULO, Justice.

*Dutchess Special Term, Oct. 1849.*—This was an action commenced by summons and complaint for the partition of lands. Commissioners having made partition, the plaintiff's counsel moved to confirm their report. The defendants' counsel opposed, upon the ground that no notice of the proceedings on the part of the commissioners had been served upon the defendants' attorney. It appeared, however, by plaintiff's affidavit, that notice had been given personally to the defendants, and that one of them was present at the time the commissioners made the partition.

O. E. BOWMAN, *for plaintiff.*

ARMSTRONG & CONGER, *for defendants.*

BARCULO, Justice.—The statute does not require notice of the commissioners' proceedings to be given to the parties. For aught that is said by the statute, the commissioners may make partition without the actual knowledge of any of the parties. There would seem, however, to be a propriety in giving the parties some opportunity of being heard before the commissioners. As, however, a technical notice is not required, I think the notice and attendance of one of the defendants, as shown in this case, sufficient.

As this action was commenced under the code by summons and complaint, I take the opportunity to correct what seems to be a misapprehension on the part of one of the justices of this court, of the opinion in the case of *Traver v. Traver* (8 How. 321.) In deciding *Myers agt. Rasbach* (4 How. 88,) Justice Gridley states that, in *Traver v. Traver*, I had expressed a doubt "whether a suit for the partition of lands is a regular judicial proceeding." I certainly had no intention of expressing any such doubt in relation to a *suit*. I did not intend to say that proceedings by *petition* for partition were not merged in the legal actions of the code. The case of *Traver v. Traver* was one commenced by petition. If it had been commenced by bill in chancery, as a suit, the decision must have been otherwise; for the *legal action* of the code is expressly substituted

for *suits in equity* by section 69, old code. As, under the former system, proceedings for partition could be commenced either by *bill* or *petition*; and as the bill has been abolished and the legal action substituted, it follows that the only remedies now remaining are the legal action of the code and the old petition. Such is the understanding of the law, and such the uniform practice before the justices of this district.

The report of the commissioners must be confirmed.

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### SUPREME COURT.

EZRA NEWTON agt. STEPHEN SWEET et al., executors of STEPHEN V. R. SWEET, deceased.

In proceedings for claims against estates, where a reference is had under the 36th section of the statute relating to the duties of executors and administrators (2 R. S. 89,) and a report is made in favor of the claimant, or plaintiff, he is entitled (under the code) to the *necessary disbursements and fees of officers allowed by law, including the compensation of referees*, against the executors; although the court may have adjudged that he was not entitled to costs against the executors.

*It seems*, that by the 311th section of the code, the prevailing party, in every instance, is entitled to have inserted in the judgment "*the necessary disbursements and fees of officers allowed by law.*"

The same principle of construction established in the case of *Taylor agt. Gardner*, ante, 67, where the plaintiff recovered no more costs than damages.

*Albany Special Term, Sept. 1849.*—The plaintiff having presented to the defendants a claim against the estate of which they are executors, the same was referred pursuant to the 36th section of the statute relating to the duties of executors and administrators. The referee reported that there was due to the plaintiff \$294.32. The plaintiff, at a special term of this court, moved, under the provisions of the 41st section of the same act, that he be allowed costs as against the estate. The motion was denied. Subsequently the plaintiff's attorney served on the defendants' attorney a statement of his disbursements in the case, with notice of an application to the clerk to insert the same in the entry of judgment. The defendant's attorney appeared before the clerk, and objected to the allowance. The clerk inserted for disbursements, including \$18 for the fees of the referee, \$31.64, which the defendants now move to strike out of the judgment.

E. F. BULLARD, *for plaintiff.*

L. I. LANSING, *for defendants.*

**HARRIS, Justice.**—By the 37th section of the act relative to the duties of executors and administrators, (2 R. S. 89,) it is provided that when a claim against an estate is referred pursuant to the provisions of that act, it is to be regarded in all respects as a suit commenced by ordinary process, and the court may adjudge costs as in actions against executors. The rights of the parties, then, in respect to costs, are the same as if an action had been brought by the plaintiff upon his claim against the executors. By the last clause of the 317th section of the code, it is declared that the provisions of that section shall not be construed to allow costs against executors and administrators, where they had, by the 41st section of the act above referred to, been exempted therefrom. Under that section, no costs could be recovered against executors or administrators, unless allowed by the court upon special application. Such application has been made in this case, and denied. The plaintiff is, therefore, not entitled to recover costs as a part of his judgment.

But what are the costs of which, by the operation of the last clause of the 317th section of the code, the plaintiff, though the prevailing party, is deprived? Previous to the adoption of the code, the compensation allowed by law to attorneys, solicitor and counsel, as well as other officers, was called *fees*. Such fees, when brought together and liquidated by an officer authorized to tax the same, were denominated *costs*. It was also provided by law, that in addition to such *fees*, certain disbursements might also be allowed in the taxation of costs. (2 R. S. 634, § 20.) So that the term *costs* embraced all fees of officers, including the attorney or solicitor and counsel, and such disbursements as were allowed by law to be taxed; but by the code, the meaning of the term *costs* is changed. The 303d section abolishes all fees of attorneys, solicitors and counsel; and in lieu of such fees, declares that certain allowances may be made to the prevailing party, which allowances are termed *costs*. Thus we have a definition of the term, as it is used in the code. It embraces merely the allowances made to a prevailing party, as a substitute for the fees of attorneys and counsel. The next two sections declare in what cases costs, as thus defined, shall be recoverable as a matter of right. The 306th section declares the cases in which such costs shall be recoverable or not, in the discretion of the court; and then the 307th section proceeds to fix the amount of such allowances when recoverable. The 308th and 309th sections provide for an increase of such allowances in certain cases. Then the clerk is required by the 311th section to insert in the entry of judgment, upon the application of the prevailing party, "*the sum of the charges for costs, as above provided;*" and also "*the necessary disbursements and fees of officers*

*allowed by law, including the compensation of referees, and the expense of printing the papers upon any appeal."* These disbursements, and fees of officers, are to be included in the judgment, in addition to the *costs* which the party is entitled to recover.

Were it not for the last clause of §17th section, the plaintiff would, I think, have been entitled to the costs prescribed by the §7th section, as well as necessary disbursements and fees of officers, as of course. It is an action of which, according to the §4th section of the code, a justice of the peace has no jurisdiction, and is therefore embraced in the third subdivision of the §4th section, which declares in what cases costs shall be allowed of course. But the operation of the last clause of the §17th section is confined to *costs*; and its effect, if I am right in the meaning I have attached to the term *costs*, as used in the code, is to deprive the plaintiff, as the prevailing party, of such *costs* as he would otherwise have recovered under the §4th section. It prohibits the clerk from entering in the judgment "*the sum of the charges for costs*," but not "*the necessary disbursements and fees of officers allowed by law*." These he is yet to insert in the judgment as required by the §11th section. Indeed, as I understand that section, the prevailing party *in every instance* recovers necessary disbursements and fees of officers. This construction of the section is certainly commended by the manifest justice of such a provision.

I am aware that the framers of the code do not seem, in all cases, themselves to have had in view the change which they have made in the signification of the term *costs*. Thus in the §4th section it is provided, that when several actions are brought for the same cause of action, against several parties who might have been joined in the same action, "no *costs* other than disbursements" shall be allowed, &c. The language here used, would seem to imply that *disbursements* were to be regarded as embraced, in the term *costs*, and that it was intended by that provision that *no costs except disbursements* should be recovered in the cases specified; but construed in connexion with the other provisions to which I have referred, I think it should be held to mean that *disbursements only*, and *no costs*, should be recovered in the cases to which it is applicable. So, also, the security to be given under the 182d, 230th, 334th, and perhaps some other sections of the code, is to the effect that the party giving the security shall pay all costs and damages which may be awarded against him. The construction above given to the term *costs*, may have the effect to exempt the sureties in such cases from liability for disbursements and officers' fees as not embraced in their undertaking, unless, as perhaps they

might be, they are recoverable as damages. On the other hand, there are other provisions, as the 301st and 371st sections, which plainly recognize the distinctions between allowances for *costs* and *fees and disbursements*.

I have already had occasion to decide that the provision which declares that in certain cases a plaintiff shall recover no more *costs* than damages, is not applicable to disbursements and fees of officers, (*Taylor v. Gardner*, 4 Howard, 67.) The correctness of this decision, so far as I have understood, has not been questioned. The same principles of construction which led to that conclusion, in this case entitles the plaintiff to his necessary disbursements and the fees of officers paid by him, although he does not recover costs. The motion must therefore be denied, but without costs.

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### SUPREME COURT.

JOHN A. MILLARD agt. WILLIAM H. SHAW, EDWIN R. TOWNSEND  
and HIRAM T. HYDE.

A demurrer to a creditor's bill, for the reason that the bill does not show that a transcript of the judgment was docketed in the county where one of the several defendants resides, will not lie, where it does not appear upon the face of the bill, *that the judgment debtor had real estate subject to the lien of the judgment* in that county. This allegation may be set up in an answer, and, if established by proof, will authorize a dismissal of the bill.

Where execution has been issued, by the consent of the defendant, on the day of docketing the judgment, and made returnable in *six days*, it is no ground of demurrer to a creditor's bill, that it does not set out the legal effect, force, or form of the consent, by which such execution was issued and returned. It is enough, if the bill alleges that the form of the execution as to its return, and the time at which it was taken out, were in pursuance of the defendants' agreement.

*Rensselaer Special Term, April, 1849.*—The plaintiff alleges in his bill, that on the 22d May, 1848, he recovered a judgment against the defendants for \$400 debt and \$25.63 damages and costs; and that the judgment was docketed in the clerk's office of Rensselaer county, on the same day. The bill states that on the same day, "*by the consent of the defendants,*" a *fi. fa.* was issued to the sheriff of Rensselaer county, where Townsend & Hyde resided, and to the sheriff of the city and county of New York, where Shaw resided, returnable in *six days* "*by consent of the*

*defendants therein named, previously obtained."* It states the usual return of *nulla bona* of both executions and contains the ordinary averments of a creditor's bill. *There is no averment that the judgment was docketed in the city and county of New York, where Shaw resided; nor does it appear that either defendant was seized of real estate in that city or county.*

There is a demurrer to the bill, assigning for cause, that it does not set out the legal effect, force, or form, of the consent to issue the execution, within the time provided by law for issuing executions, nor whether such consent was verbal or written; 2. That it does not show that a transcript was docketed in New York; and 3. It does not state legally why the execution was made returnable in less than sixty days, the time prescribed by the law of 1840, p. 334, § 24.

J. NEIL, *for defendant.*

J. A. MILLARD, *contra.*

WILLARD, Justice.—The plaintiff was entitled to file his bill, whenever his writ of *fieri facias* issued on the judgment to the sheriff of the county where the defendants resided, was returned unsatisfied in whole or in part (2 R. S. 173, § 38; *Child v. Man*, 4 Paige, 309.) The judgment creditor must make a *bona fide* attempt to collect his debt, by execution against the property of the defendant; and if it appears on the face of the bill that the judgment debtor has real estate subject to the lien of the judgment, it is a good ground for dismissing the bill, if not of a demurrer. If the existence of tangible property of the debtor, which has not been levied on, does not appear by the bill, it may be set up in the answer, or, if established by the proofs, will entitle the defendants to a dismissal of the bill, (*ib.*) The law contemplates that the goods and chattels and real estate of the defendants should be first exhausted, before the equitable interest of the debtor should be sought by a resort to a creditor's bill.

In the present case the execution has been issued to the proper counties, and the requisite return of the sheriff has been made and filed, and there is no allegation in the bill that either of the defendants own real estate anywhere. It was therefore unnecessary to docket the judgment in the city and county of New York, (L. of 1840, § 25.)

The 24th section of the act of 1840, (Laws of 1840, p. 334,) authorizes the issuing of an execution at any time after the expiration of thirty days from the entry of the judgment, and the making it returnable sixty days from the receipt thereof. These two provisions were for the benefit of the defendant, which it is competent for him to waive. No other per-

son can take advantage of the irregularity but the defendant and he cannot do it against his own consent. *Volenti non injuria*. The bill alleges, that the form of the execution as to its return, and the time of which it was taken out, were in pursuance of the defendant's agreement, and this is admitted by the demurrer.

The demurrer, therefore, must be overruled with costs, but with liberty to the defendant to answer on payment of costs.

A motion is also made on the part of the plaintiff, for the appointment of a receiver. I perceive no objection to the motion. It must be referred to Giles B. Kellogg, Esq., as referee, to appoint a receiver with the usual powers.

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## COURT OF APPEALS.

JACOB CARPENTER agt. MARY S. CARPENTER.

An order, setting aside a decree of divorce, taken as confessed, and allowing alimony, &c., is not an appealable order to this court.

*May Term, 1849.*—This was a motion to dismiss an appeal from an order of the Supreme Court, made at a general term, on the 4th of January, 1849.

On the 26th May, 1847, the complainant (Jacob Carpenter) filed his bill for divorce. The bill was taken as confessed on the 22d of June, 1847, on an affidavit of service of subpoena, and an order of reference made. On the master's report of the facts, a decree for divorce was granted in December, 1847. The defendant moved that the order taken by default be set aside, &c.; which motion was granted, and an order entered 20th December, 1847. On the 29th December, 1847, a further order for alimony and counsel fee was obtained by defendant. Proceedings were then stayed by the general term, until the complainant could apply for a re-hearing of the two last mentioned orders at the general term on the 17th January, 1848. In the meantime an arrangement was got up between the parties, by which it was agreed that the decree of divorce should stand. A bond for support, &c., was given. A motion was then made at general term by the complainant (and opposed,) that the orders of 20th and 29th December, 1847, (setting aside the decree of divorce, and allowing alimony, &c.,) should be set aside and vacated, &c.; which motion was granted on the 25th January, 1848. A rehearing of the motion for the 17th January,



1848, was then applied for in behalf of the defendant, and that the order of the 25th January, 1848, should be set aside; which motion was referred to a justice at special term, and was heard before Mr. Justice Morse, October 23d, 1848, and an order entered, annulling the order of the 25th January, 1848, and restoring the orders of the 20th and 29th December, 1847. This last mentioned order of Judge Morse (23d Oct. 1848,) was affirmed on a rehearing by the Supreme Court, at a general term, on the 4th of January, 1849, with costs; from which last mentioned order at general term, this appeal was brought.

The effect of the order of Judge Morse (Oct 23d, 1848,) so affirmed at the general term on the 4th of January, 1849, was to restore the two original orders: the first, of the 20th December, 1847, setting aside a decree of divorce, and letting the defendant in to defend; the second at the 29th December, 1847, allowing the defendant a counsel fee and alimony.

A. J. SPOONER, *for motion.*

EDWARD SANDFORD, *opposed.*

The court held the case under advisement a few days, when they decided that the order appealed from was not an appealable order to this court, and granted the motion to dismiss with costs.

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## COURT OF APPEALS.

HENRY R. DUNHAM and WILLIAM BROWNING agt. JAMES B. NICHOLSON.

An order setting aside an answer as frivolous, and that the plaintiff have judgment as for want of an answer, and a further order that the defendant submit to an examination on oath concerning his property, and the judgment to be given on the complaint, is not an appealable order to this court. It is not *the final judgment* in the action.

*May Term, 1849.*—This was a motion to dismiss an appeal, on the ground that the order was not appealable to this court.

The original order was made by Hon. Lewis H. Sandford, one of the justices of the superior court in the city of New York, at chambers, and is as follows:

(Title of the cause as above.) "On reading the complaint and answer in this cause, and on hearing counsel for the respective parties; it is or-

dered, that the answer of the defendant be set aside as frivolous, and that the plaintiffs have judgment as for want of an answer. It is further ordered, that the said defendant appear before one of the justices of this court, at their chambers in the City Hall of the city of New York, on the 19th day of December instant, at ten o'clock in the forenoon, and submit to an examination on oath concerning his property, and the judgment to be given on such complaint; and that the plaintiffs be at liberty to examine witnesses in said proceeding. "LEWIS H. SANDFORD.

"New York, December 14, 1848."

An appeal was taken from this order, by the defendant, to the general term of the Superior Court; and on the 24th February, 1849, the appeal was heard, and an order entered by the general term, dismissing the appeal and affirming the order appealed from, with costs. From this last order, the defendant brought an appeal to this court.

EDWARD SANDFORD, *for the motion*.

JAMES T. BRADY, *for the defendant*, insisted that the order appealed from was a *final judgment*, within the meaning of § 11 of the code.

The court after having held the motion under advisement a few days, decided that the order was not appealable, under the code.

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## COURT OF APPEALS.

FREDERICK J. CONANT and CHARLES WELLS, Appellants, agt.  
ALBERT A. VEDDER, Respondent.

The following case is reported, to show the *usual terms* required by the court in opening a regular default, upon what may be considered the ordinary excuses.

*September Term, 1849.*—This was a motion on the part of the respondent to set aside or open a default taken by the appellants on the 17th July, at the last July term of the court, held at Norwich, N. Y.

The attorneys and counsel for both parties resided in the city of New York. On the part of the respondent, it appeared from the affidavit of his attorney, John Sherwood, Esq., that he, Sherwood, was, on Thursday evening, July 12th, and Friday, July 13th, seriously attacked with symptoms of the disease then prevalent in New York, which precedes cholera. That the counsel in the cause, Samuel Sherwood, Esq., his father, was detained in New York, on Friday, the 13th, and Saturday, the 14th of July, in consequence of such illness. From the affidavit of

the counsel, Samuel Sherwood, Esq., it appeared that he intended to leave New York to attend the July term on Friday morning of the 13th; but in consequence of the illness of his son, as stated, he did not leave until Saturday night, 14th of July, and then took the Kingston boat, where he had a conveyance in waiting, by means of which he would have been able to have reached Norwich on Monday evening the 16th; but in consequence of the unusual northwest wind, the boat did not reach the landing until 11 o'clock on Sunday morning; and although he travelled Sunday evening, he was unable to reach Norwich until Wednesday morning, 18th July, a distance of 120 miles.

In opposition to the motion, the affidavit of W. Emerson, Esq., one of the attorneys and counsel for the appellants, stated that he left the city of New York on Saturday evening the 14th July, at 6 P. M. and spending Sunday in Albany, arrived at Norwich on Monday evening about 5 P. M., by the ordinary public conveyance.

SAMUEL SHERWOOD, *for motion.*

W. EMERSON, *opposed.*

The court allowed the default to be opened, on payment of \$50 counsel fee by the respondent to the appellants, and the costs of the term.

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## DECISIONS OF THE COURT OF APPEALS.

At the request of a number of subscribers, to have published in these Reports the *decisions* made in causes argued and determined in the Court of Appeals; and believing that they may be made useful to the profession, by briefly stating the subject-matter of each case decided, (and if reported, where it may be found,) and by commencing at the first decisions made by the court, and keeping up regularly with each successive term, as a matter of reference, in a connected form, to *all* the causes decided in the Court of Appeals, this manner of their publication will undoubtedly be found convenient.

The principal benefit in these publications, in this manner, will be, to keep the profession informed of the different questions decided (or principles settled) by the court; that in case all the causes should not be re-

ported, or should they eventually be, it may be known at an early day, that such questions (or principles) have been brought before the court, and decided and settled by them. Of course, these reports will only convey information upon the main points, or subject-matter of each case *generally*; the particular grounds and reasons must always be obtained from the opinions of the court.

The Court of Appeals organized under the Amended Constitution of 1846 and the Judiciary Act of 1847, at the Capitol in the city of Albany, on the first Monday (5th) of July, 1847. The several judges were sworn into office on that day as follows:

FREEBORN G. JEWETT,  
GREENE C. BRONSON,  
CHARLES H. RUGGLES,  
ADDISON GARDINER.

The several justices of the Supreme Court were also sworn into office the same day.

Upon the organization of the Court of Appeals, in order to proceed to business, the several judges took their seats according to the class to which they respectively belonged; the Chief Judge having the shortest term to serve.

The four justices of the Supreme Court having the shortest term to serve in the first, third, fifth and seventh judicial districts, were designated by law as judges *ex-officio* of the Court of Appeals, and took their seats according to their judicial district, commencing with the first; eight judges composing the Court as follows:

|                     |                             |
|---------------------|-----------------------------|
| FREEBORN G. JEWETT, | <i>Chief Judge.</i>         |
| GREENE C. BRONSON,  | } <i>Judges.</i>            |
| CHARLES H. RUGGLES, |                             |
| ADDISON GARDNER,    |                             |
| SAMUEL JONES,       | } <i>Judges ex-Officio.</i> |
| WILLIAM B. WRIGHT,  |                             |
| CHARLES GRAY,       |                             |
| THOMAS A. JOHNSON.  |                             |

The court adopted their rules, and directed them to be published; but did no other business at this term.

The next term of the court was held on the first Tuesday (7th) of September, 1847, at the Capitol in the city of Albany. Present—The same Judges.

This being the first term at which any business was done, there were of course but few causes decided, and those decisions were made upon the argument. The first of which was, JOHN PIERCE, plaintiff in error, vs. JAMES E. DELAMATER, defendant in error. . Argued by R. E. ANDREWS, for plaintiff in error; C. L. MONELL, for defendant in error. —*Judgment affirmed.*

This cause originated in a justice's court. The action was brought on an account. The question was as to the sufficiency of the evidence upon which the judgment was rendered; it being a confession of the defendant. (Reported, 3 Howard's Pr. R. 162.)

JOHN G. BRITTON et al. plaintiffs in error, vs. ISAAC FRINK, sheriff, &c. defendant in error. Argued by A. K. HADLEY and N. HILL, jr. for plaintiffs in error; E. S. BULLARD, for defendant in error. —*Judgment affirmed.* This suit originated in a justice's court. The action was brought by Frink for moneys overpaid on a bill of attorney's costs. The principle settled was, that an excess of costs paid to an attorney on the settlement of a suit, *without taxation*, may be recovered back by action; also that payment of fees illegally demanded is not a voluntary payment. (Reported, 3 Howard's Pr. R. 102.)

JOSEPH MOAK, plaintiff in error, vs. HENRY FOLAND, defendant in error. Argued by C. D. COLMAN for plaintiff in error. —*Judgment affirmed*, upon the opening argument. This suit originated in a justice's court. The action was brought by Foland, in trover, to recover the value of certain fowls Moak had received under an agreement. It was a question of fact as to ownership, the evidence upon which was conflicting. The court said it was for the justice to decide in such a case, and they would not reverse a judgment on such grounds, although it might seem that the weight of evidence was against the decision. (Reported, 3 Howard's Pr. R. 84.)

HARVEY LOOMIS, plaintiff in error, vs. JAMES MONROE, defendant in error. Argued by B. DAVIS NOXON for plaintiff error; N. HILL, jr. and D. WRIGHT, for defendant in error. *Judgment affirmed.* —Loomis sued Monroe to recover the value of a building called the Arcade, erected at Ballston, N. Y., by Loomis in pursuance of written agreements between them; Monroe being a stockholder and president of the Saratoga Railroad Co. and the building being intended for the use of the company. The question arose upon the construction of the agreements, whether the undertaking by Monroe to pay for the building was collateral or original. The case does not seem to have been reported in either court.

These were all the decisions (in calendar causes) made at this term.

## SUPREME COURT.

THOMAS BURCH agt. WALTER L. NEWBURY, impleaded, &c.

The 460th section of the code (amended) provides that "an appeal may be taken from any final decree, entered upon the direction of a single judge, in any suit in equity, pending in the Supreme Court on the *first day of July*, 1847, within ninety days from the time this act shall take effect; but this section shall not apply to cases, where a rehearing has already been had or ordered, and such appeal shall be taken in the manner provided in sections 327 and 348." No suit in equity was pending in the Supreme Court on the *first day of July*, 1847, but not until the *first Monday* (5th) of *July*, 1847. (Const., art. 14, § 6.) On a motion to dismiss an appeal, in a suit commenced in the Court of Chancery, because the appeal was not authorized by § 460 of the code: *held*, that such a construction should be given to this section (which is the familiar rule in construing statutes) as would best answer the intention the makers had in view—which intention should be collected from the cause or necessity of making the statute, and which should not suffer it to be eluded. And it was undoubtedly the intention of the Legislature, in this section, to restore the right to a rehearing in suits in equity pending on the first Monday of July, 1847, where it had been lost, by extending the right of appeal ninety days from the passage of the code, and that this section should be construed to be applicable to all suits in equity pending in the Supreme Court on the first Monday of July, 1847.

Section 460 is not unconstitutional. It is merely a provision extending the time for bringing an appeal. It affects the remedy only.

Where the collection of costs is coerced, and the payment is not voluntary, it does not deprive the party paying them of his right of appeal.

*St. Lawrence General Term, September, 1849.*—PAIGE, WILLARD and HAND, Justices.—Motion by the defendant, Newbury, to dismiss an appeal brought by the plaintiff to the general term of the Supreme Court, from a final decree made in the cause by Justice Gridley, on the second Monday of December, 1847, dismissing the plaintiff's bill with costs.

The appeal was brought on the 29th of June, 1849, under the 460th section of the amended code. A copy of the decree was served by the defendant on the plaintiff, by mail, on the 22d of January, 1848. The suit was commenced before the Chancellor in 1845. The plaintiff applied for a rehearing at a general term of the Supreme Court held at Watertown, in July, 1848. The application was denied, on the ground that a notice of the application for a rehearing was not served within the 30 days required by the 78th rule of the court; and that the plaintiff had not complied with the conditions imposed by the 7th section of the supplemental code. The defendant, on the 8th of February, 1849, issued an execution upon the decree for his costs, and collected them of the plaintiff.

PAIGE, Justice.—It is insisted by the counsel for the defendant, that the plaintiff's appeal is not authorized by the 460th section of the amended code, because the suit was not pending in the Supreme Court on the 1st day of July, 1847. The 460th section provides that "an appeal may be taken from any final decree entered upon the direction of a single judge in any suit in equity, pending in the Supreme Court on the 1st day of July, 1847, within ninety days from the time this act shall take effect; but this section shall not apply to cases where a rehearing has already been had or ordered, and such appeal shall be taken in the manner provided in sections 327 and 348." On the 1st day of July, 1847, this suit was pending in the Court of Chancery, not in the Supreme Court. The suits pending in the Court of Chancery were not transferred by the new constitution to the present Supreme Court until the first Monday (which was the 5th) of July, 1847. (Const., art. 14, § 6.) If we, therefore, adhere strictly to the words of the 460th section of the amended code, an appeal can not be taken from the final decree in this suit, nor, under this section, from any such decree in any other suit in equity, as no suit in equity was pending in the Supreme Court on the 1st day of July, 1847. If we give the section a strict construction, we render it entirely nugatory, as it will apply to no decree whatever. No person who reads the section can doubt, for one moment, that the Legislature intended, in adopting the section, to allow an appeal to be taken from a final decree made by a single judge in any and every suit in equity pending in the Supreme Court on the first Monday of July, 1847, where a rehearing had not already been had or ordered. The words "the first day of July" were evidently, through inadvertence or mistake, substituted for the words "the first Monday of July."

It is a fundamental and familiar rule in the construction of a statute, that such a construction should be given to it as will best answer the intention the makers had in view. This intention may be collected from the cause or necessity of making the statute. (Bac. Stat. I. 5.) And whenever this intention can be discovered, it should be followed with reason and discretion in the construction of the statute, although such construction may seem contrary to the letter of the statute. The cause and necessity of the 460th section of the amended code was the loss of the right to a rehearing in suits in equity pending on the first Monday of July, 1847, by a neglect of the parties to comply with the rules of the court, or the requisitions of section 7, of the supplemental code. And it was undoubtedly the intention of the Legislature to restore this right by allowing the parties to take an appeal within ninety days from the time

the amended code took effect ; or, in other words, by extending the right of appeal for the period of ninety days from that time. Such a construction ought to be put upon a statute as will not suffer it to be eluded. (Bac. Stat. 1, 10.) Unless we construe section 460, as applying to suits pending in the Supreme Court on the 1st *Monday of July*, 1847, it will not only be eluded, but it will be a dead letter. To give it a different construction, will be imputing to the Legislature the folly of gravely enacting a provision, which has no application to any person or thing in existence, and which when enacted, will remain an unmeaning, useless incumbrance upon the statute-book. Respect for the law-making power forbids such an imputation. The question presented to us on the construction of this section of the code, it strikes me is too plain to admit of discussion. I entertain no doubt, not only that the Legislature intended that section 460 should be applicable to all suits in equity pending in the Supreme Court on the first Monday of July, 1847, but that we have the right, and are required to give such a construction to that section.

This suit was pending in the Supreme Court on the first Monday of July, 1847. The final decree was made after that day. (1 Comstock's Rep. 608.)

The collection of the costs from the plaintiff having been coerced by means of an execution, does not deprive the plaintiff of his right of appeal. The payment of the costs was not voluntary, but wholly compulsory.

Section 460 of the amended code was not unconstitutional. It was merely a provision to extend the time for bringing an appeal. It affected the remedy only, it did not impair the obligation of contracts or take away a vested right. (1 Hill, 328-9 ; 3 Peters, 280 ; 8 do. 110 ; 11 do. 420 ; 2 do. 414 ; 2 Yerg. 125 ; 10 Shepl. 310 ; 1 McLean, 35 ; 5 Howard's Miss. 285 ; 4 Watts & Serg. 218 ; 6 Shepl. 109 ; 5 Burr, 145 ; 4 Gil. 221.) The case of *Calder v. Bull*, (3 Dallas, 386,) is an express authority in affirmance of the constitutionality of the 460th section of the amended code. In that case, the right of appeal had been lost, and the Legislature of Connecticut passed a law setting aside a decree of the Court of Probate for Hartford county, and authorizing a new hearing of the case and an appeal to the Superior Court ; and the Supreme Court of the United States held that the act was constitutional. It is universally conceded that statutes of limitation, which prolong or shorten the period within which an existing remedy may be enforced are constitutional. (1 Hill, 328.)

The 460th section of the amended code extending the time for bringing an appeal, is not more objectionable than the supplemental code



which limited the time for applying for a re-hearing to ten days; thereby repealing that part of the Judiciary Act of 1847, which allowed an application to be made for a re-hearing without any limitation as to time.

The latter clause of section 460, which denies an appeal to cases where a re-hearing has already been had or ordered, has no application to this case. Here no re-hearing has been either had or ordered. A re-hearing was applied for, but the application was denied.

The motion to dismiss the plaintiffs' appeal must be denied with \$10 costs.

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### SUPREME COURT.

**MARTIN B. STODDARD**, Plaintiff in error, agt. **JOSIAH D. CLEVELAND** and others, Trustees of the Society of the Methodist Episcopal Church in **Masonville**, Defendants in error.

An action cannot be maintained against a subscriber to a voluntary subscription paper, which is voluntarily entered into by him, by which he promises to pay a certain sum to the trustees of a certain society for a specified purpose. There is no consideration to uphold such a promise—it is a mere *nudum pactum*.

*General Term, Sixth Judicial District, Nov. 1849.*—**MASON, MOREHOSE** and **H. GRAY**, Justices.

This society sued Stoddard in a Justice's Court upon a subscription to the society to purchase a school-room to be converted into a house of religious worship. The cause was tried before a jury, who found a verdict for the defendant; and the cause was then removed into Delaware County Court, by certiorari, and the judgment of the justice was reversed by that court, and Stoddard sued out a writ of error to this court to reverse the judgment of the County Court. The facts of the case will sufficiently appear from the opinion of the court.

The subscription paper reads as follows:

“**MASONVILLE**, Sept. 15th, 1844.

“We the subscribers, do agree to pay the sums set opposite our respective names, to Josiah D. Cleveland, Samuel G. Cleveland or Festus P. Cleveland, trustees, for the purpose of purchasing the building formerly used as a store, but recently as a school-room, owned by Erasmus Parker, to be converted into a place of worship for the use of the Society of the Methodist Episcopal Church in **Masonville**, with the understanding that

all sums of five dollars or under, are to be paid by the first day of September, 1845, and all sums over five dollars are to be paid by the first day of September, 1846.

Subscribers' names:

|                  |         |
|------------------|---------|
| J. D. Cleveland, | \$40.00 |
| S. D. Cleveland, | 25.00   |

Martin B. Stoddard, (deft.) \$10.00, and twenty-three other signers of different sums."

PARKERS & PALMER, *for plaintiff in error.*

CHARLES C. NOBLE, *for defendants in error.*

By the Court, MASON, Justice.—The declaration in this case is upon the subscription paper which was voluntarily entered into by the defendant, by which he promised to pay ten dollars to the plaintiffs as trustees, for the purpose of purchasing a particular building for the use of the religious society of which the plaintiffs were then trustees. This, I infer, was a voluntary subscription to this society. There is not, at any rate, any consideration expressed in the subscription paper, and there is none appearing from the evidence in the case. It was proved by the plaintiff, upon the trial, that the defendant signed the subscription paper, but there is no evidence in the case to show that any others signed it. The plaintiffs proved that they had purchased the building, received a conveyance of the same, and that they had given back a bond and mortgage to secure the purchase money. The question arises, can an action be sustained upon such subscription? It was decided in *Bou-tell and others v. Cowdin*, (9 Mass. Rep. 254,) that a promissory note made in aid of a fund for the support of a minister of a parish was void for want of consideration. The case of *The Trustees of Limerick Academy v. Davis*, (11 Mass. Rep. 112,) which was a subscription to build an academy, and by which the subscribers agreed to pay the sums set opposite their names in money or materials for erecting an academy in Limerick, is very much in point. The court held that no action could be maintained upon the subscription, for the reason that the promise was a *nudum pactum*, there being no consideration for the promise. The Supreme Court of Massachusetts reiterates the same doctrine again in the case of *The Trustees of Farmington Academy v. Allen*, (14 Mass. Rep. 172, which was also a subscription to erect an academy. The court say no action can be sustained upon the promise contained in the subscription, although there being an account for money laid out and expended, and the evidence in the case being deemed sufficient to render the defendant liable to the plaintiffs, they were permitted to recover.

In the case of *The Trustees of the Bridgewater Academy v. Gilbert*, (2 Pick. R. 579,) the defendant and others subscribed certain sums for rebuilding an academy, and the trustees, without any other act on his part, purchased material for building, and then the defendant refused to pay the sum subscribed by him. The court held, that an action would not lie against him on the paper itself, nor on the ground of money paid at his request. It has been supposed by some that Chief Justice Parker had advanced a different doctrine in Massachusetts in the subsequent case of *The Trustees of Amherst Academy v. Cows*, (6 Pick. R. 427. This case decides nothing different from the other cases. The defendant in that case had subscribed a subscription of \$100 to the charitable fund established in Amherst for the classical education of indigent pious young men, and, after those purposes of education were in operation, he gave his promissory note for the amount. The note expressed upon its face, for value received; and the court decided that the defendant was liable upon the note. The court do not mean to overrule the prior cases, for they are all cited in the opinion of the court, and none of them repudiated. And, besides, Chief Justice Shaw, who delivered the opinion of the court, was upon the bench during the whole period of these former decisions and concurred in them. The same doctrine was affirmed in the court of *dernier resort* in this state, in the case of *Stewart v. The Trustees of Hamilton College*, (2 Denio R. 403,) which was an action brought by the trustees upon Stewart's subscription to a "fund for Hamilton College," in which it was adjudged that the agreement of an individual to make a donation of money to a literary or religious institution without any undertaking on the part of the donee to do anything, is without consideration and void. And the same case was before the Court of Appeals again after a re-trial in the circuit, and the broad principle of these Massachusetts cases affirmed, and the defendant was declared not to be liable upon his subscription, (1 Comstock R. 581.) It seems to me that these cases are decisive of the case at bar. I am not able to distinguish these cases, or to discover any difference in principle between them. Neither have I been able to discover any principle of law upon which an action on such a promise can be sustained. There is no consideration upon which it can be upheld. The trustees entered into no obligations or promise in return, and it does not help their case any as the pleadings are framed in this case, that the trustees went on and purchased the building. This could not render a promise that was before void, a valid one—a mere *nudum pactum* cannot be thus by the act of one of the parties converted into a valid contract. I do not hesitate to say, in conclusion, that the County

Court erred in this case in reversing the judgment of the justice, and that it is the duty of this court to reverse the judgment of the County Court, and affirm that of the justice.

NOTE.—It is understood that Mr. Justice MOREHOUSE dissented from this opinion.

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## SUPREME COURT.

VAN RENSSELAER agt. DUNBAR.

On an application for service of summons by publication, where the sheriff alleged that he was unable to serve it personally; that he was fastened out of defendant's house when he went to make the service; that before arriving at the house, notice was given of his approach by the blowing of horns; that after he left the defendant's house, the blowing of horns continued, and soon the defendant appeared, following him on horseback, blowing a horn, but kept too far off to enable him to serve the summons; he, however, got near enough to defendant to inform him he had a summons for him, but was not able to come up with defendant, who rode off out of sight—and that whenever he went into that neighborhood, notice thereof was invariably given by blowing of horns, &c. *Held*, that such a case did not come within the provisions of the code (§ 135) for publication. It could not be said that the defendant could not be found, and kept concealed, &c.

*Albany Special Term, Oct. 1849.*—This was a motion for publication of the summons, as in case of an absent or concealed defendant, in an action for rent. It appeared by the affidavits of the sheriff of Albany, (in which county defendant resided,) and his deputy, that they had not, with the utmost diligence, been able to serve the summons. That they went to the defendant's residence, but his wife fastened the door, and refused admittance. Before they arrived at the house, notice was given of their approach by blowing of horns. After they left the defendant's house the blowing of horns continued, and soon the defendant appeared, following them on horseback and blowing a horn, but kept too far off to enable them to serve the summons. The deputy, however, got near enough to defendant to inform him that he had a summons for him, but he was not able to come up with defendant, who rode off out of sight, and the deputy could not serve the process. It further appeared, that whenever the officers went into that neighborhood, notice of their appearance was invariably given by blowing horns, &c.

C. M. JENKINS, *ex parte*, insisted that this was a proper case for publication. (Code, § 135.)

HAND, Justice.—By the 135th section of the code, “where the person on whom the service is to be made, cannot, after due diligence, be found in the state,” &c., an order for publication can be made in the cases specified in the subdivisions of that section. The 2d subdivision allows this order, “when the defendant, being a resident of this state, has departed therefrom, with intent to defraud his creditors, or avoid the service of a summons, or keeps himself concealed therein with the like intent, and the action arises out of contract, or the nonfeasance or misfeasance complained of, is a breach of contract.” It is contended, that in this case, the defendant keeps himself concealed within this state to avoid service of the summons. If that were so, a case for publication is, in other respects, made out by the affidavits. But the facts do not sustain this part of the case. Not only must there be a failure to find the defendant within the state after due diligence, but if he is a resident, he must depart the state, or keep himself concealed therein with intent to defraud his creditors, or to avoid the service of the summons. If he can be found within the state, the matter is left to the vigilance of the proper officers. No doubt, if he is concealed for the above purposes, so that he cannot be found after due diligence, though temporarily, that would justify the order. But mere inability to serve the process is not sufficient. Suppose the defendant boldly locks himself into his house, without concealment, or, having the fleetest horse, though constantly visible to the officer, eludes pursuit, and defies all efforts to serve him with a copy of the summons, it cannot be said that he cannot be found, and keeps himself concealed. *To conceal* is to hide, to withdraw from observation, to keep from sight. (*Webster*.) If the statute had only required generally, that the defendant could not be found within the state after due diligence, and the sheriff had returned *non est inventus*, perhaps that might have been sufficient, as it is said that a return of *non est inventus* is good, although the plaintiff knew where to find the defendant. (See 2 Saund. R. 71, n. 4, (*f*), edition of 1846.) But it requires proof of concealment with intent to defraud creditors, or to avoid the service of the summons. Perhaps, too, these facts would lay the foundation for a proceeding to outlawry before that was abolished. Whether a party now has *in all cases* some remedy—by the code, or by the act against absconding, concealed and non-resident debtors—or by a suit against the sheriff, it is not necessary now to determine. (Code, §135; 2 R. S. 1; Watson on Sheriffs, 116; 2 Esp. N. P. Ca. 475.) It is sufficient that this case is not brought within the statute, and the motion must be denied.

Motion denied.

## SUPREME COURT.

GILMORE agt. HEMPSTEAD et al.

It is *irregular* for a complaint to be sworn to before the *plaintiff's attorney*, but it cannot be treated as a *nullity*. The defendant's remedy should be by motion (the first opportunity) to set it aside.

*Albany Special Term, Oct. 1849.*—Motion to set aside the proceedings of plaintiff after judgment, because the complaint was sworn to before the plaintiff's attorney. The defendant treated it as a nullity.

JOHN PERCY, *for the motion*.

A. J. COLVIN, *contra*.

HAND, Justice.—In England it has long been considered irregular to take an affidavit before the attorney in the cause. And even in a proceeding by *habeas corpus*, the Court of King's Bench, out of respect to personal liberty, would have disregarded this circumstance, but they said "the rule was invariable, and was founded on the wisest and most obvious principles," and adhered to it. (*King v. Wallace*, 3 T. R. 403.) And in *Taylor v. Hatch*, (12 J. R. 339,) our Supreme Court said it was "a fit and proper rule, which we shall therefore adopt as the practice here." The same practice prevailed in our Court of Chancery, (*The People v. Spalding*, 2 Paige 326,) as well as in England, though for a time fluctuating there. (1 id. 3 Dan. Pr. 1771, and cases there cited.) It seems it may be taken before counsel, or the clerk or partner of the attorney; but as to the attorney, the rule is well established. (15 J. R. 531; 17 J. R. 2; 6 Cow. 587; 5 Paige, 530; Barnes, 45; 1 Tidd, 451; 1 Lee's Dic. Pr. 28; 2 Richardson's Pr. 95; 2 Paine & Duer's Pr. 54; 1 Petersd. Ab. 368-9.) Though now in England not before the attorney's clerk. (3 Chit. Gen. Pr. 492.)

The plaintiff contends that when this complaint was verified, no suit was pending. It is true that an affidavit to hold to bail, or where it is preparatory to the commencement of a suit and no suit pending, may be taken before the attorney in this state. (*Vasey v. Godfrey*, 6 Cow. 587. And see 1 Ridd 155, 451; *Howard v. Nalder*, Barnes, 60.) This, however, I do not consider that case. It is the verification of a complaint which takes the place of a bill in equity or a declaration at law; and even if the statute required it to be made simultaneously with the summons, it should not be verified before the person who may be supposed to draw it up.

But the defendants are too late. They should have moved to set aside, and not have treated it as a nullity, and lie by till after judgment. Here has been great delay. None of the books, I believe, say it is a mere nullity. It is an irregularity, though one which may subject the attorney or solicitor to costs. (*In re Hogan*, 3 Atk. 812.) But I do not find the rule carried further. Chitty says it will not be received. (Ch. Gen. Pr. 292.) Petersdorf, in giving an abstract of the case of the *King v. Wallace*, makes the court say that "the manner in which the affidavits have been sworn entirely invalidates them." But that was not the language used. I have always supposed it a rule of practice that could be waived by the other side; and that in effect has been done here. No doubt the court should discountenance a practice in no way commendable; but, as between party and party, I do not think the proceedings void.

This view renders it unnecessary to decide the other point raised—whether the defendant can, under the amended code, wholly disregard a complaint imperfectly verified, or must answer it as one not verified at all.

Defendants can only come in on terms.

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## SUPREME COURT.

WALKER agt. HUBBARD et al.

Where a summons was issued without any reference to the court in which the action was pending—no court whatever being named in it; and a complaint was subsequently issued in which there was no reference whatever to any court except in the title, which commenced "Sup. Court." *Held*, that the complaint sufficiently named the court under § 142. And the summons might be amended under §§ 173, 176.

*Albany Special Term, Oct. 1849.*—In this case, among other objections taken to plaintiff's proceedings, it was insisted that the summons was irregular in not stating in what court the action was pending. No court whatever was named in the summons. It was answered that the code did not require this, nor were the forms so in our new books of practice.

A complaint had also been subsequently served, in which no reference to any court was made, except that the title began "Sup. Court," &c.

R. W. PECKHAM, *for the motion to set aside the proceedings.*

A. TABER, *contra.*

HAND, Justice.—We have two courts with concurrent jurisdiction of certain matters, as foreclosure of mortgages, partition, &c. (§ 30.) The

proceedings in foreclosure are commenced by summons and may be so in partition. (§§ 129, 130, 448.) And also in some other proceedings under § 30. It seems reasonable, as well as analogous to all former practice, that the defendant should know in what court he is sued. The statute plainly implies this where the action is not a contract for the recovery of money only, for then the summons must state that "the plaintiff will apply to *the court* for the relief demanded in the complaint." (§ 129.) The defendant may wish to look to the cause without answering, and without delaying it by demanding a copy of the complaint. (§§ 130, 1, 246.) And now, by the amended code, the complaint and summons do not necessarily go together. (§ 130.) It is better to have uniformity in the practice, whether the action be on contract or not.

The title of the cause in the complaint sufficiently named the court under § 142.

It is insisted that the plaintiff cannot amend. I have no doubt of the power of the court to amend the summons, (§§ 173, 176,) in such a case. It is not analogous to a case where all reference to the court is omitted in the complaint, in violation of the statute, especially where there are several courts having concurrent jurisdiction.

The motion to set aside the summons and subsequent proceedings must be granted with \$7 costs, unless within twenty days the plaintiff amends the summons by inserting the name of the court in which the defendant is required to appear, which he is permitted to do on payment of \$7 costs.

Motion granted, but with leave to amend, &c.

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## SUPREME COURT.

CHARLES M. DAVIS agt. WILLIAM C. POTTER.

An answer which denies a material allegation in the complaint, cannot be stricken out as "*frivolous*."

The first subdivision of the 149th section of the code reads as follows: "The answer of the defendant shall contain: 1. In respect to each allegation of the complaint controverted by the defendant, a general or specific denial thereof, or a denial thereof according to his information and belief, or any knowledge thereof sufficient to form a belief."

Where an answer, verified, denied a material allegation of the complaint not on "*information and belief*," "*nor of any knowledge thereof sufficient to form a belief*," but on *belief only*. Held, that the first clause of the 149th section, which permits a "*general or specific denial*," did not in terms confine the denial to facts within the knowledge of the defendant, and the answer under that clause should be sustained and not stricken out as a "*sham*," under the 152d section.



The general issue being abolished by the code, an answer now which denies one material allegation in the complaint can not be stricken out, on motion, as "*false*." It forms an issue which the defendant has a right to have tried in the usual manner.

The 152d section which provides, that *sham* answers and defences may be stricken out on motion, does not necessarily include *false* answers and defences. The words "*sham*" and "*false*" are synonymous, as the word "*sham*" is used in that section. If it were so, the *truth* of every answer might be tested on special motion—which would be a dangerous practice.

An affidavit verifying a pleading is defective, (subject to amendment) in using the words "information and belief," instead of saying "information or belief," as required by § 157.

*Albany Special Term, August, 1849.*—This was a motion to set aside the defendant's answer and for judgment on the ground that the answer was "false, sham and frivolous."

The complaint was upon a judgment alleged to have been recovered on the 5th May, 1837, by one Clark Baker against the defendant; and the plaintiff alleged that after the recovery thereof, said Baker, for a valuable consideration, assigned said judgment to the plaintiff, "who is now the legal owner of the said judgment, and the moneys due thereon, and is entitled to demand and receive satisfaction of the same."

The answer and verification were as follows:

"*Supreme Court.* CHARLES M. DAVIS agt. WILLIAM C. POTTER.—

And the said defendant verily believes and therefore answers the complaint in this action and says, that the plaintiff is not the owner of the claim on which this action is founded, and that the same was never assigned to the said plaintiff, and that he is not entitled to demand or receive satisfaction of the said demand.

"R. M. & M. I. TOWNSEND, *Def't's atty's.*"

"*Rensselaer County, ss.*—William C. Potter, the above named defendant, being sworn says, that the foregoing answer is true of his own knowledge, except as to the matters which are there in stated to be on his information and belief, and as to those matters he believes it to be true.

"WM. C. POTTER.

"Sworn, Oct. 27th 1849, before me,

"CHARLES W. ROOT, *Com. of Deeds, Troy.*"

The motion was founded upon the pleadings and the affidavits of Clark Baker and the plaintiff, showing the assignment of the judgment for a valuable consideration, and the affidavits of J. Holmes and G. R. Davis, Jr., stating that they were present at such assignment.

J. HOLMES, *for plaintiff.*

P. CAGGER, *for defendant.*

PARKER, Justice.—The answer is not frivolous. It denies a material allegation of the complaint. If the plaintiff does not prove satisfactorily, on the trial, the assignment to him of the judgment, he must fail in his action.

The denial in the answer is made upon *belief* and not upon *information* and *belief*; and the plaintiff insisted that such an answer is not allowable. Section 149 of the code allows the defendant to make, "to each allegation of the complaint controverted by the defendant, a general or specific denial thereof, or a denial thereof according to his information and belief, or of any knowledge thereof sufficient to form a belief." It seems to me absurd to say that a defendant may deny an allegation of the complaint, when he has not knowledge thereof sufficient to form a belief, and yet shall not be permitted to deny such allegation when he believes it to be untrue. Such a construction could not have been intended and does not, in my opinion, necessarily belong to the language employed. It is certain that the intent would have been more satisfactorily expressed, if in the second clause of the section, the denial was required to be according to his information *or* belief. But I think the first clause is ample to sustain this answer. It permits a general or specific denial and does not, in terms, confine such denial to facts within the knowledge of the defendant.

This construction of the section last mentioned is sustained by the provision of the 157th section, which prescribes, as a verification of the pleading, that the affidavit of a party shall state that the same is true of his own knowledge, except as to the matters which are therein stated on his information *or* belief, and, as to those matters, he believes it to be true." This clearly implies that matters may be stated in the pleading on *belief* only.

If I am right in this view, a material allegation is denied in the form and manner prescribed by statute; and the answer cannot therefore be called a *sham* answer, within the meaning of the 152d section of the code.

The next question is, whether the answer can be struck out as *false*. It would certainly be a dangerous practice to try issues of fact on affidavits. Under the late practice of this court, the plea of the general issue was never struck out as false; and where new matter was set up, an affidavit of the truth of the plea was a perfect answer to the motion. (*Tucker v. Ladd*, 4 Cowen's Rep. 634; *Oakley v. Devoe*, 12 Wend. 196.) The practice ought not to be changed in this respect, under the code. The general issue being abolished, the defendant, instead of denying all, has denied one of the material allegations of the complaint; and

he has a right to require that the issue thus joined, shall be tried in the usual manner.

The 152d section of the code provides that *sham* answers and defences may be stricken out on motion; but the counsel for the plaintiff is wrong in supposing that *sham* is there used as synonymous with *false*. If it were so, the *truth* of every answer might be tested on a special motion. Parties would thus be enabled in making affidavits to become witnesses for themselves, and the right of trial by jury would be disregarded. It is only where the answer takes issue upon some immaterial averment of the complaint, or sets up new and irrelevant matter, that it can properly be called a "*sham*" defence. I find nothing in comparing section 152 with section 247, which denotes that the Legislature intended to say that a *sham* pleading meant anything different from a *frivolous* pleading. I think both words describe the same kind of defence, except that a *frivolous* answer may not necessarily imply that its object was evasion or delay.

The affidavit annexed to the answer appears to be defective, in using the words "information *and* belief" instead of saying "information *or* belief." But the motion is not made on that ground, nor was any such objection stated on the argument.

The motion must therefore be denied, but without costs; and the defendant is at liberty to amend the affidavit annexed to his answer.

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### SUPREME COURT.

JOSEPH BURNETT, Respondent, agt. THOMAS HARKNESS, 3d,  
Appellant.

No appeal can be taken to the Supreme Court from the order of the County Court reversing the judgment of a justice of the peace, where the County Court has ordered a new trial, for the reason that the County Court does not give any final judgment and there is no provision for the entry of a judgment in such a case in the County Court.

Where an appellant elects to dismiss his own appeal he must enter an *order* to that effect *and pay the respondent's costs*. A written notice served on the respondent that the appeal has been dismissed, is not sufficient—nor is an order to that effect, without the payment of the costs.

This suit was commenced in a Justice's Court in Delaware county and the cause tried before a justice and a jury, and resulted in a verdict

for the defendant, upon which a judgment was entered, and the defendant appealed to the Delaware County Court, and in which court the judgment of the justice was reversed and a new trial ordered, and the defendant appealed to this court, and the cause was noticed for argument at the last March general term at Delhi, and the court refused to hear the cause for the reason that no appeal was permitted in such a case; and the plaintiff now moves to dismiss the appeal. Before the papers were served for this motion, the attorneys for the defendant served a written notice upon the plaintiff's attorney, that the court having treated this appeal as a nullity, the same was annulled and superseded.

MASON, Justice.—The appeal in this case, both to the County Court and this court, was made under the act of April 12th, 1848. (Chap. 379 of the Laws of 1848, page 555.) It has been repeatedly decided in this court, that no appeal could be taken to this court from the order of the County Court reversing the judgment of a Justice of the Peace where the County Court had ordered a new trial, for the reason that the County Court did not give any final judgment, and that there is no provision for the entry of a judgment in such a case in the County Court. I take it to be well settled that the appeal in this case can not be sustained. It is said, however, that the papers show that the appellant has elected to dismiss his own appeal, and that for this reason this motion should be denied. I do not understand, from the opposing affidavits, that any order dismissing the appeal has been entered in this cause. There is nothing more than the service of a notice upon the respondent's attorney that the appellant regarded the appeal as a nullity, and that the same was superseded. I do not think it could change the case in any respect, if the appellant had entered an order dismissing the appeal on his own motion, unless he had also paid the costs. The respondent may treat such a rule as a nullity. There is no precedent for making such a rule the foundation of a judgment of discontinuance. The party against whom such a rule is entered may treat it as a nullity, and proceed the same as though it were never entered. (7 Hill's R. 197; 10 J. R. 367; 1 W. R. 13; 7 W. R. 511; 12 W. R. 191; 2 Hill's R. 384; 4 Hill's R. 166.) Such I regard the well settled practice. It follows, therefore, that this appeal must be dismissed, and I do not see any reason in the case why the appellant should be exempted from the costs of the appeal, and of this motion. The appeal must be dismissed with costs to the respondent on the appeal, and ten dollars costs of this motion, and I do not see how we can afford any relief on this motion to the appellant in the matter complained of in his opposing affidavits.

If the respondent in this case has obtained a judgment in the manner stated in these affidavits, this appellant is not remediless. He has his action for such a fraud and breach of good faith, but I do not see how we can afford him any relief on this motion. This motion to dismiss the appeal must be granted with costs, and the respondent have his costs of the appeal.

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### SUPREME COURT.

BENTON HALLOCK agt. MARIA HALLOCK.

In an action for divorce, by the husband against the wife, for adultery, she is entitled to an allowance for her support, pending the litigation, and to a further sum to enable her to defend the action, if she denies, on oath, the charge of adultery. Although it may appear by affidavits on the part of the husband, that she is guilty of the charge.

The poverty of the husband forms no defence to such an application; although the circumstances in life of the parties should be taken into consideration in fixing the amount.

*Albany Special Term, November, 1849.*—The complaint in this action was filed for a divorce on the ground of adultery. The defendant moved for an allowance for alimony, and to enable her to defend the suit. She swore, in her affidavit, that she was not guilty of the charge, and that she had been told by the plaintiff she could not remain at his house.

The plaintiff showed, by affidavits, circumstances tending strongly to prove the guilt of the defendant—and also that, on her leaving his house, he gave her \$25 in cash, and a bed valued at \$25, and offered to pay her board at her mother's till the determination of the action, and to procure her counsel to defend the suit, but that she said she did not intend to make any defence.

M. SANFORD, *for defendant.*

R. W. PECKHAM, *for plaintiff.*

PARKER, Justice.—Where the wife is defendant in a suit for divorce, if she denies, on oath, the charge of adultery, she is entitled to an allowance for her support pending the litigation, and to a further sum to enable her to defend the action. (2 Barb. Ch. Pr. 265; *Wood v. Wood*, 2 Paige, 109; 2 R. S. 207, 3d ed.) And, where she thus denies her alleged guilt on oath, she is entitled to such allowance, although affidavits are read, on the part of the husband, showing the guilt of the wife. (*Osgood v. Osgood*, 2 Paige, 621; *Williams v. Williams*, 3 Barb. Ch. Rep. 628.) The question of guilt can not be tried by conflicting affidavits. Great injustice

might be done, if the husband were not compelled to furnish to his wife the means of having so important a question of fact decided in the usual manner.

The plaintiff states in his affidavit that he is not worth more than \$200 over and above his liabilities, exclusive of property exempt from execution, and that his wife is capable of earning her own support. The poverty of the husband forms no defence to an application of this character in an action in which he is plaintiff. He must conform to the general rule or abandon his suit. (*Purcell v. Purcell*, 8 Edw. 194.) But it is proper to take into consideration the pecuniary ability of the husband and the circumstances in life of the parties, in fixing the amount of the allowance. It seems to me, that there are good reasons for directing but a moderate additional allowance in the present stage of the litigation. It is desirable also to avoid the expense of a reference.

The order will, therefore, direct the plaintiff to pay to the defendant twenty-five dollars on demand, to enable her to defend the action, and a weekly allowance of one dollar and fifty cents, payable quarterly from the date of the order, pending the litigation.

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## SUPREME COURT.

BRADFORD agt. COREY, impleaded, &c.

A promissory note, payable to bearer, (given on the purchase of a store of goods) and endorsed by "D. P. C., surety," and "T. L., security," who were sued jointly (in 1844,) by declaration, containing the common money counts, with a copy of the note annexed, (the note having been regularly protested,) and D. P. C., appeared and pleaded separately, *Held*, that the addition of the words "surety" and "security," to the endorsers' names, did not divest them of their character of endorsers. The only effect of those words were to give them the privileges of surety in addition to their rights as endorsers. As endorsers they could not be made liable without a demand and notice. And as sureties they were entitled to all the privileges of that character. They having endorsed the note severally, they could not be either joint endorsers or co-sureties. The note being payable to bearer did not make their liability a joint one. They should be deemed liable as endorsers in the order in which their names stood upon the note. And being several endorsers, the suit was properly brought against them jointly, under the statutes of 1832, ch. 276, and of 1837, ch. 93, and the note was admissible in evidence under the money counts in the declaration. It was not necessary to declare against them specially. The case of *Buller v. Rawson*, 1 Denio, 105, not applicable to such a case.

*Schenectady General Term, Jan. 1849.*—PAIGE, WILLARD and HAND, Justices.—This was a motion on the part of the plaintiffs to set aside a report of referee made in favor of the defendant Corey. The suit was commenced in 1844, by declaration containing the money counts alone, on a joint note given by Abram Shuler and Francis Newkirk to Henry Randall or bearer, dated December 17, 1836, payable two years after date, and endorsed by Martin I. Borst, David P. Corey and Timothy Livingston. Corey affixed to his name the word "surety," and Livingston the word "security." A copy of the note was added to and served with the declaration. The declaration was made out against all the drawers and endorsers. The declaration was not served on either of the drawers, nor on Borst the first endorser. Corey appeared and pleaded separately. The note was regularly demanded when it fell due, and notice of non-payment duly served on all the endorsers. Evidence was introduced before the referee, tending to show payment of the note by Borst, the first endorser, before the commencement of the suit. The note was given by Shuler and Newkirk, the drawers, to Randall, the payee, on the purchase of a store of goods by them from Randall. Corey endorsed the note as security. Shuler, Newkirk and Borst all failed, and were discharged under the bankrupt act in 1842 or 1843. Borst, by an arrangement with the drawers, in the fall of 1838, assumed the payment of the note. It was objected on the hearing, that the note was not admissible in evidence under the money counts, the defendant Corey having endorsed the note as surety. The referee after hearing the evidence, without passing upon the facts of the case, decided in favor of the defendant Corey, upon the ground that the note was not admissible in evidence under the declaration.

D. P. COREY, *in proper person.*

D. WRIGHT, *for the plaintiff.*

By the Court, PAIGE, Justice.—An endorser of a promissory note, although in the nature of a surety is not for all purposes entitled to the privileges of that character. He is answerable upon an independent contract, and it is his duty to take up the note when dishonored. (6 Wend. 618; 8 Wend. 199; 9 Cow. 206; 21 Wend. 504; 16 John. 152; *id.* 72, 40.) The endorser, when duly fixed, ought to pay the note without waiting to be sued. If he permits himself to be sued, it is his own fault, and he cannot resort to the drawer for indemnity against the costs of the suit. (*Simpson v. Griffin*, 9 John. 131.) In some respects there is a resemblance between an endorser and a surety; in others there is none.

(8 Wend. 613.) The undertaking of an endorser is conditional; it is to pay, if the maker of the note does not, upon being required to do so when the note falls due, and upon the further condition that the endorser be notified of such default. But if an endorser endorses a note for the accommodation of the drawer, to enable him to borrow money, the endorser is regarded as a surety for the drawer, and the latter, by implication of law, undertakes to save the endorser harmless of and from all expenses and costs to which he may be subjected in consequence of his endorsement. And in such case, the endorser can charge the drawer with the costs of a suit for the collection of the note which he may have been compelled to pay. (15 John. 273; 7 Bing. 217; *Jones v. Brooks*, 4 Taunton, 466; 16 John. 70; 1 Greenl. Ev. sec. 401; *Edmonds v. Low*, 8 Barn. & Cres. 407.) But, although an endorser stands in the relation of a surety to the drawer, in consequence of an endorsement of an accommodation note, or of a special promise of the latter to save him harmless, he does not lose his character of endorser as it respects the holder of the note. And he cannot be made liable on the note without a demand and notice. He continues endorser with all the privileges of a surety.

In this case, the addition of the word surety or security, by Corey and Livingston, to the endorsement of their names on the note in question, did not divest them of their character of endorsers. The only effect of the addition of these words to their signatures, was to give them the privileges of a surety in addition to their rights as an endorser. As endorsers, they could not be made liable without a demand and notice. And as sureties, they were entitled to all the privileges of that character. But inasmuch as they endorsed the note severally, they cannot be either joint endorsers or co-sureties. The note being payable to bearer, does not make their liability a joint one. They endorsed the note before it became due, and probably at the time it was made. Their endorsement is a several one; and they must be deemed liable as endorsers in the order in which their names stand upon the note. If Corey and Livingston are several endorsers, the suit was properly brought against them jointly under the statutes of 1832, ch. 276, and of 1837, ch. 93. They were different parties to the note—several not joint endorsers. They could not have been sued jointly at common law. The action against them is a statute action, and not an action at common law.

This being so, the note was admissible in evidence under the money counts in the plaintiff's declaration. (*Buller v. Rawson*, 1 Denio, 105; *Miller v. McCagg*, 4 Hill, 35.) The suit being properly brought under the statutes of 1832 and 1837; the case of *Buller v. Rawson* is not appli-



cable. It was not necessary, the suit being brought under these statutes, to declare against Corey specially on the note, although he endorsed the note as a surety for the drawers. The referee, therefore, erred in deciding that the note was not admissible under the declaration. The referee did not pass upon any of the facts of the case. His report in favor of the defendant was made upon the sole ground that the note was not admissible under the declaration.

The report must be set aside, and the case must be referred back to the referee.

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## SUPREME COURT.

RICHARD C. VAN WYCK agt. ISAAC ALLIGER.

Where the court direct that "no costs are allowed" upon granting a motion in an *interlocutory* order, (dissolving an injunction,) and the party in whose favor the motion is granted finally succeeds in the suit—no costs can be allowed him on the taxation of the general costs in the cause, for such motion. The decision of the court must control the costs, on such a motion. They cannot be included and taxed as *final* costs in the cause. The taxing officer has no discretion in such a case. (*Ante*, 74.)

*Dutchess Special Term, Nov. 1849.—Motion for retaxation of costs.*—The suit was commenced by bill in equity to restrain waste, and an injunction obtained. On the coming in of the answer, the defendant moved to dissolve the injunction, which motion was denied. The defendant applied for a rehearing at a general term, when the former decision was reversed and the injunction was dissolved, with direction as to costs in these words: "but no costs are allowed, and the order of this court heretofore entered granting costs to defendant on said motion be, and the same is hereby vacated and annulled." This order was made in September, 1848. The cause was finally decided on its merits, in favor of the defendant, in June, 1849. On the taxation of costs, the justice by whom they were taxed allowed the costs of the above motion to dissolve injunction by items, according to the old fee bill, amounting to \$54.93. The plaintiff appeals, and now applies for a retaxation.

JNO. THOMPSON, *for plaintiff*.

J. HARDENBUGH, *for defendant*.

BARCULO, Justice.—It seems to me that the order made at the general term plainly disposes of this case. If the order had been silent on the

subject of costs it might have left a question whether the costs of the motion should not abide the result. Under the old practice, there were instances, such as motions to change venue, &c., where the costs abided the event of the suit without any special directions. But in this case the order declares that "no costs are allowed," and as if to put it beyond all dispute, a former order granting costs, which seemed to have been inadvertently entered, "is vacated and annulled." Now, to permit this taxation to stand would be permitting a taxing officer to reverse a decision of the court and allow costs when the court had expressly declared that no costs should be allowed.

It does not remove the difficulty to say, that there is a distinction between interlocutory and final costs. The objection to this allowance lies deeper than that. It is that the *taxing officer* has no *discretion* to be exercised, he is not to say whether a party is to have costs or not. The court only can decide that matter. The case of *Savage & Cowen v. Darrow*, 4 How. 74, is an authority on this point.

Again, there is another insuperable objection to the allowance of these costs, which would have prevented the court from allowing them if disposed; and which may perhaps explain the "vacating and annulling" of the order granting costs. The *statute* does not permit such costs to be awarded. Even under the amended code, no more than ten dollars can be allowed. (§ 315.) And under the law, as it stood at the time of the decision, no costs could be allowed to the defendant on the motion, he being the moving party. (Code of 1848, § 270.) Indeed, this very question was decided in the case as it is reported. (3 How. 292.)

It appears, however, from the opinion in that case, that the order was "to be silent on the subject of costs." But, in this respect, the order differs from the opinion, and of course the former must govern. The opinion also states that the defendant would be left "to tax the costs of both motions in the event of his succeeding in the suit." This, however, was not made a part of the decision of the motion; and with all due respect to the learned court, I think it could not have been legally. When the statute declares in terms that no costs shall be allowed on a motion, the court has no more power to award the costs of the motion as *final costs*, than they have to allow them as interlocutory costs. If the costs could be taxed by items as final costs, the very evil which the Legislature designed to prevent would be increased.

The motion must be granted and the sum of \$54.93 struck out of the bill. Neither party can have costs of the motion.

## SUPREME COURT.

ALBERT CONBO and others agt. HORACE GRAY, PORT HENRY IRON Co. and others.

A corporation which shall for one year suspend its ordinary and lawful business, shall be deemed to have surrendered its franchises and shall be adjudged to be dissolved. (2 R. S. 463-4, sections 38 and 56.)

Where a corporation ceases to act and the president and principal stockholders assume to use the property as their own, there is no other remedy for the creditors but to file a bill (a complainant now,) and ask for a receiver.

A receiver will be appointed, where there are no persons to take charge of the effects of the company and preserve them for the benefit of the creditors and stockholders generally, (1 Paige, 587;) also, where a fraud is shown in the defendant and the fund is in danger of being wasted or misapplied, (5 Simons, 485; 1 Barb. R. 664; 1 Hopk. 429; 3 John. Ch. 48;) also, to prevent the removal of the property beyond the jurisdiction of the court. The merits are not inquired into on a motion for a receiver.

Where the president of a corporation, who was the principal stockholder, (six-sevenths,) assigned the personal and a portion of the real estate to different assignees, in trust to pay his individual debts: *Held*, that he was guilty of a breach of trust and of a fraud upon the creditors of the company. And the assignees, by accepting the assignments, might be deemed parties to his breach of trust. It is no answer to the appointment of a receiver in such a case, that the assignees are solvent and responsible.

*Schenectady General Term, Jan. 1849.*—PAIGE, WILLARD and HAND, Justices. Appeal by the defendants Tuckerman and others from an order of Justice Willard appointing a receiver of the rents and profits of the real estate of the personal property of the Port Henry Iron Co.

G. W. MORRIS, *for appellants.*

GEO. A. SIMMONS, *for the respondents.*

By the Court. PAIGE, Justice.—The plaintiffs allege in their bill that the personal property assigned by Horace Gray to Joseph Tuckerman, and the parcel of land called the Stone purchase, conveyed by Gray to Hooper, Bullard & Coffin, as assignees, belong to The Port Henry Iron Company; that Tuckerman has taken possession of the personal property assigned to him, and has applied a part of the same, and threatens to apply the whole of the residue in payment of the individual debts of Horace Gray, pursuant to the trusts of Gray's assignment to him. The plaintiffs also allege in their bill that Hooper, Bullard & Coffin claim to control the iron works, ore beds and other real estate, including the Stone purchase of The Port Henry Iron Co., for the uses of the assignment to them in payment of the individual debts of Horace Gray.

It is also alleged in the bill, that the plaintiffs are creditors of the Port Henry Iron Co.; and that all the property of said company, including that assigned, is not more than sufficient to pay the debts of the company. Horace Gray owned six-sevenths of the stock of the company, and was president thereof. And the bill alleges that he, from 1845 to 1847, ran the iron works and carried on the business of the company under a lease at a nominal rent, but for the use and benefit of the corporation. Hooper, Bullard & Coffin reside in the state of Massachusetts. The plaintiffs allege in their bill and show by affidavits that the iron works and ore beds, during the pendency of the suit, ought to be used and operated for the advantage of all the parties interested therein.

In answer to the application for a receiver, the defendants show, that Tuckerman, Hooper, Bullard & Coffin are gentlemen in good credit, and of pecuniary responsibility, that the complainants are creditors at large only; and they urge also, in opposition to the motion, that the bill does not allege the insolvency of the corporation.

Upon a motion for a receiver, the merits are not inquired into. Such motion relates only to the preservation of the property in controversy. (4 Wend. 178.)

Horace Gray, as president of the Port Henry Iron Co., was a trustee of the creditors of the company. His assignments of the property of the company in trust to pay his individual debts, was a breach of trust and a fraud on the creditors of the company. The property, if it belonged to the company, was a trust fund for the payment of its creditors. And such creditors having claims on such fund for the payment of their debts, had a right, before proceeding to judgment and execution, to file a bill against the corporation and the assignees of Gray, to prevent a misapplication of the trust fund, and to secure its appropriation to its legitimate uses, viz.: the payment of the debts of the company. (Story's Eq., §§ 827, 835, 851; *Innes v. Lansing*, 7 Paige, 583.) And the court, to accomplish this object, may either appoint a receiver, or require security for the due preservation and appropriation of the property.

The bill in this case comes within the equity of the provisions of the Revised Statutes, in relation to proceedings against corporations in equity. (2 Rev. Stat. 463-4, sections 38 and 56.) A corporation which shall for one year suspend its ordinary and lawful business shall be deemed to have surrendered its franchises and shall be adjudged to be dissolved.

In this case the corporation ceased to act and the president and principal stockholders assumed to use the property as their own, there was no other remedy for the creditors but to file this bill and ask for a receiver.

Where there are no persons authorized to take charge of and conduct the affairs of a corporation, a receiver will be appointed to take charge of the effects of the company and preserve them for the benefit of the creditors and stockholders generally. (*Lawrence v. Greenwich Fire Insurance Co.*, 1 Paige, 587.) And a receiver will be appointed, where a fraud is shown in the defendant, and the fund is in danger of being wasted or misapplied. (*Podmore v. Gunning*, 5 Simons, 485; 1 Barb. R. 664; 1 Hopk. 429; 3 John. Ch. 48.) Here, there are no persons authorized to take charge of the property of the corporation; and the president, by assigning the property, was guilty both of fraud and a breach of trust. A receiver also will be appointed to prevent the removal of property beyond the jurisdiction of the court. There is danger of such removal, at least so far as respects the property assigned to the assignees in Massachusetts. (8 Paige, 377.) And a receiver will be appointed as against a defendant, who is out of the jurisdiction of the court. (*Gibbons v. Mainwaring*, 9 Simons, 77; *Tanfield v. Irvine*, 2 Russ. 149.)

The defendants, by accepting the assignments from Horace Gray, may be deemed parties to his breach of trust. And there is danger that they will misapply the property assigned, to the injury of the plaintiffs. Under the circumstances, the solvency of Tuckerman is no answer to the motion for a receiver as to him. And the non-residence of the other assignees is a sufficient ground for the application as to them.

The order of Justice Willard, appointing a receiver, must be affirmed with costs.

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## SUPREME COURT.

SAMUEL FERGUSON agt. PETER N. BASSETT.

It seems to be settled doctrine in this state, both at law and in equity, (as affirmed by the Court of Errors in the case of *Nicoll et al. v. Nicoll*, (16 Wend. 446, overruling the chancellor's decision in the same case,) that the attorney's lien for costs must yield to the equitable right of set off, and that the latter claim in equity overrides the former.

*Quere?* Whether, if the question could be considered an open one, satisfactory reasons might not be assigned against such a rule; as the King's Bench in England have long since done, and as all the courts of Westminster Hall have recently asserted by their judges assembled at Hilary Term, in 1832, and by adopting a rule to allow the attorney's lien in such cases, which is binding upon all the common law courts in England. (1 Dowl. Pr. Cases, 196; 3 id. 638.)

If the right of set-off exists at the time of the assignment, the assignee takes, subject to all equitable as well as legal claims which might be urged against the assignor at the time of the assignment. (1 Cow. 56 and 206; 4 Hill, 561.) And this right exists as against the attorney's lien for costs, although the attorney may be the assignee. (3 Paige, 365.)

The right of set-off does not exist against a *verdict* merely. It is only in cases of *judgments* obtained. (10 Wend. 615; 6 Cow. 598; 4 Hill, 559.) A verdict is only *prima facie* evidence of the existence of a debt. If the right to set-off does not exist against a verdict at the time of its assignment, it cannot arise afterwards when the judgment is entered. (4 Hill, 559; 2 Ed. Ch. R. 73.)

*Motion made and decided at Delaware Circuit, Nov. 18th, 1849.*—This is a motion made to set off one judgment against another, and the motion is founded on affidavits from which the following facts appear: On the 22d day of March, 1849, the plaintiff recovered a verdict against the defendant for \$55, at the Delaware circuit held by me, and prior to which time, to wit, on the 1st day of October, 1847, one Allen H. Davis recovered a judgment in the Supreme Court, against the said Samuel Ferguson for \$67.78, and which was recovered for the costs of defending a suit in that court, brought by Ferguson against him. On the 22d day of March, 1849, and immediately after the rendition of the verdict in this cause, the said Peter M. Bassett, for a valuable consideration, purchased and procured an assignment of the judgment in the suit of *Allen H. Davis* ads. *Ferguson* to him, the said Bassett, and immediately thereupon, and within a very few minutes after the rendition of said verdict, caused a written notice to be served upon Ferguson, stating that the judgment in the suit of *Davis* ads. *Ferguson*, had been assigned to him, Bassett, and that he should claim to set off the same against the verdict and judgment in this suit—and also served a similar notice upon Mr. Palmer, one of the attorneys for Ferguson, in the suit of *Ferguson* v. *Bassett*. And it appears, from the affidavits before me, that these notices were served just as Ferguson had set down to the table in the Court house to execute an assignment of the said verdict of \$55, to Messrs. Parker & Palmer, his attorneys, in said suit; and it also appears that the verdict was assigned to the Messrs. Parker & Palmer on the same day, and just after the service of the aforesaid notices, for a valuable consideration. It also appears that the said Ferguson was owing the Messrs. Parker & Palmer at the time, about \$100, and that when the suit was commenced against the said Bassett on the 8th of January, 1849, it was agreed by and between the said Ferguson and his attorneys, that whatever verdict might be recovered in the suit, his attorneys should have it to discharge this prior indebtedness of \$100, and that said verdict was assigned to them accordingly; and on the first day

of August, 1849, the said Parker & Palmer entered up a judgment upon the said verdict: Damages, \$55.00; costs of suit, \$62.60, making \$117.60.

J. A. HUGHSTON, *for Bassett.*

A. PARKER, *for Ferguson.*

MASON, Justice.—In allowing a set-off of judgments, courts of law have proceeded upon the equity of the statute authorizing set-offs, and their power consists in the authority they hold over suitors in their courts. The doctrine of the common law courts was that suitors might ask the interference of courts of law in effecting a set-off not "*ex debito justitiæ*" but *ex gratia curiæ*. (*Simson v. Hart*, 14 J. R. 63.) And as these motions in the common law courts were addressed very much to the discretion of the courts, a refusal of the common law courts to direct a set-off was not considered as *res adjudicata*, so as to prevent a bill in chancery to compel the set-off. (14 J. R. 63.) Very different, however, has been the rule on a bill in chancery filed to obtain a set-off. In such case there is no discretion. (*Nicoll v. Nicoll*, 16 W. R. 448.)

The practice of allowing the attorney's lien for costs to prevail against the right of set-off, was not fully recognized in the common law courts in England. The King's Bench allowed the lien, and the Common Pleas refused it. The common law courts in this state, however, have been uniform in their decisions, in disallowing the attorney's lien for costs, holding that the lien did not stand in the way of the right of the opposite party to have his set-off allowed. Such, at any rate, has been the uniform rule in the common law courts in this state, since the decision of the case of *Porter v. Love*, (8 J. R. 457.) The uniform doctrine of the cases has been, that the attorney's lien for costs is no bar to the right of set-off. (8 J. R. 357; *Ross v. Dole*, 13 J. 307; *Cooper v. Bigelow*, 1 Cow. 206; *The People v. N. Y. Com. Pleas*, 13 W. R. 649.)

The doctrine of the Court of Chancery in this state was precisely the same up to the year 1829. Chancellor Kent, in the case of the *Mohawk Bank v. Burrows*, (8 J. Ch. R. 317,) followed the doctrine of the common law courts, and held that the attorney's or solicitor's lien for costs did not affect the equitable right of set-off between the parties. In the case of *Dunker v. Vandenburg*, (1 Paige R. 622,) Chancellor Walworth seems to have questioned, if not relaxed the rule somewhat; and in the case of *Gridley et al. v. Garrison et al.*, (4 Paige R. 647,) the learned chancellor affirms the unqualified doctrine that the attorney's lien for costs is paramount to any claim of the adverse party to set off a judgment re-

covered against the client in another suit. And the chancellor steadily adhered to this doctrine, in his court, up to 1886, when he was overruled by the Court for the Correction of Errors, on appeal taken to that court from his decision in the case of *Nicoll et al. v. Nicoll*, (16 W. R. 446.) In this latter case the complainant held a judgment of upwards of \$16,000 against the defendant, and the defendant had recovered a judgment for costs in an ejectment suit for \$166.89, against the complainants, and the complainants filed their bill to compel a set-off of so much of their judgment as would satisfy the judgment against them. The chancellor held the attorney's lien to be paramount, and disallowed the set-off, and the court of *dernier resort*, on appeal, overruled the chancellor and allowed the set-off—affirming the broad doctrine that the attorney's lien for costs must yield to the equitable right of set-off, and that the latter claim in equity overrides the former.

This, therefore, seems to be the settled doctrine both at law and in equity in this state. I do not hesitate to say, was this an open question with us, that I could assign satisfactory reasons against such a rule, as the King's Bench in England has long since done, and as all of the courts of Westminster Hall have recently asserted. The judges of the common law courts in England, assembled in Hilary Term in 1882, and unanimously agreed and adopted the rule to allow the attorney's lien in such cases, and adopted a rule to that effect, binding upon all the common law courts in England. (1 Dowl. Pr. Cases, 196; 3 id. 638.)

I do not consider, however, in view of the repeated adjudications of the courts of this state, that we are at liberty to discuss the sufficiency or insufficiency of the reasons of this doctrine.

The only remaining question to be considered, therefore, is, whether the assignment of this verdict by the plaintiff Ferguson, before the entry of the judgment thereon, to the Messrs. Parker and Palmer, his attorneys in that suit, gives to them any higher or greater equities as assignees than they had before; or whether in short, such assignment has the effect to deprive this defendant, Bassett, of his right of set-off. The general rule is well settled, that the assignee in such a case stands precisely in the situation as regards the right of set-off as his assignor stood at the time of the assignment. It has been repeatedly adjudged that where the equitable right to set off a judgment existed at the time of the assignment as against the attorney's lien for costs, that the same continued as against the assignee, and that too, although the attorney was the assignee. (3 Paige R. 365.) It can make no difference, therefore, with this case that the verdict was assigned to the Messrs. Parker and Palmer, if the right of



set-off existed at the time of the assignment, for it is well settled that the assignee takes subject to all equitable as well as legal claims which might be urged against the assignor at the time of the assignment. (*Cooper v. Bigelow*, 1 Cow. R. 56 and 206; 4 Hill's R. 561.) It becomes important, then, to inquire whether there was a right of set-off existing in this case as against the assignor at the time of the assignment of this verdict. I am inclined to think that in the case under consideration that no right of set-off existed at the time of the assignment, for the reason that the plaintiff's claim against the defendant consisted in a verdict merely. In the case of *Garrick v. Jones* (2 Dowl Pr. Cases, 157,) the party moving had obtained a verdict which he moved to set off against a judgment in favor of his adversary, and the motion was denied on the sole ground that final judgment had not been obtained. This case was cited by Judge Cowen in the case of *Graves v. Woodbury*, (4 Hill R. 562,) with approbation, and the principle of the case affirmed by the court, and I do not hesitate to say, after a careful examination of the latter case that in my opinion it determines the right of set-off in this case against the defendant and in favor of the plaintiff.

The right of set-off only exists in the cases of judgments obtained. (10 W. R. 615; 6 Cow. R. 598; 4 Hill R. 559.) It was held in the case of *The people ex rel. Fry v. The Delaware Common Pleas*, (6 Cow. 598) that a judgment obtained by attachment in a Justice's Court without the defendant appearing there, cannot be set off on a motion, against a judgment in a court of record, for the reason that a judgment rendered upon attachment in such a case without being contested is only *prima facie* evidence of a debt, and is impeachable in an action upon it; the court saying they may as well set off a bond or note, on motion, as such a judgment.

The same may be said of the verdict of the jury in the case under consideration—it was only *prima facie* evidence of the debt like the judgment in the 6 Cow. R. *supra*. It was still open to the review of the whole trial by the court on the application of either party, and might never pass into a judgment—and if the right of set-off did not exist at the time of the assignment it could not arise afterwards when the judgment was entered. (4 Hill R. 559; 2 Ed. Ch. R. 73.) I am of opinion that the assignment of the verdict carried with it the costs also; but as the papers before me may not show the whole of the case, I will deny the plaintiff's motion to set off this judgment without prejudice to his rights to commence an action to compel this set-off, if he has any legal claim to make the set-off in this case. I must regard this as a motion addressed to

the discretion of the court *ex gratia curie*, and not a right which the party can claim *ex debito justitie* as he could have claimed, had he instituted a plenary suit by summons and complaint to compel this set-off, and I think where there is as much doubt as there is in this case, that the safer way is to deny the summary application by motion and turn the party over to his plenary suit if he desires further to contest it. Motion denied without costs.

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## SUPREME COURT.

TRUSCUTT agt. KING et al.

*Costs of an appeal (or a suit) commenced in chancery prior to the first day of July, 1848, and decided since the passage of the amended code, must be taxed according to the fees allowed in chancery, under the old fee bill. The code (amended) has expressly excepted from its operation suits pending previous to the first day of July, 1848, (§§ 8, 471.)*

*At chambers, Nov. 24. 1849.*—In this case S. D. VAN SCHAAK, Esq. presented for taxation a bill of costs made out according to the provisions of the code.

A. TABER, Esq., opposed the taxation on the ground that the bill ought to have been according to the fees allowed in chancery previous to the code. The bill amounted to over \$180. It was agreed that if made out under the Revised Statutes it would be about \$40 less.

The bill was for costs of an appeal from a decree in chancery, made by the late Vice-Chancellor of the 8th circuit. The decree was affirmed at the last September general term in this district. It was conceded that the appeal was brought before the code took effect.

Mr. VAN SCHAAK insisted that the former fee bill was absolutely repealed, (§ 303 of code,) and that in all cases decided since the code took effect, the costs were to be allowed according to its provisions.

Mr. TABER claimed that, by the provisions of the code, it was not applicable in suits pending at the time it took effect.

PARKER, Justice.—The general rule undoubtedly is, that in the absence of any statutory exception the costs would be governed by the statute (regulating costs) in force when judgment was rendered, although that statute was passed after the commencement of the suit. But the code has expressly excepted from its operation suits pending prior to

the first day of July, 1848. (Code, §§ 8, 471.) By a subsequent statute, certain sections of the code are made applicable to "existing suits," but those regulating "costs in civil actions" are not among the number.

There is no doubt but this bill of costs should be made out according to the late chancery fee bill. The case of (*Holmes v. St. John*, 2 Code Rep. 46,) is not inconsistent with this view of the law. The question there presented was whether costs should be allowed under the code, or the amended code, the suit being commenced before the code was amended and decided afterwards; and Mr. Justice WELLES was clearly right in holding that in such case costs must be governed by the amended code. The misapprehension of the point decided in that case has arisen from the too general language made use of by the reporter in his marginal note. The bill was withdrawn to be modified accordingly.

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## SUPREME COURT.

SENECA COUNTY BANK agt. LEMAN B. GARLINGHOUSE and others.

An amended complaint may be served of course, at any time within twenty days after an amended answer is served, although more than twenty days may have elapsed from the service of the original answer and replication thereto. (Code, § 172.) The amended answer may cause a necessity for an amended complaint.

An amended pleading takes the place of and supersedes the original.

*Ontario Special Term, Dec. 1849.*—The summons and complaint were served upon the defendant, September 10th, 1849. On the 29th of the same month, an answer was served upon the plaintiff's attorney, which required a reply. On the 2d day of October following, a reply was served. On the 22d of the same month, the defendants served an amended answer, which also required a reply; and on the 26th of the same month the plaintiff's attorney served an amended complaint.

Upon an affidavit showing these facts, a motion is now made, to set aside the amended complaint upon the ground that the time within which the plaintiff had a right to amend the complaint, had expired.

E. G. LAPHAM, *for the motion.*

B. SKAATS, *opposed.*

WELLES, Justice.—By § 172 of the Code of Procedure, it is provided that "any pleading may be once amended by the party of course, without costs, and without prejudice to the proceedings already had, at any time

before the period for answering it shall expire, or within twenty days after the answer to such pleading shall be served.

The defendant's counsel supposes the time within which the plaintiff had the right to amend the complaint of course, expired in twenty days after the service of the original complaint; for then the period for answering it expired; or, at most, that the plaintiff's right to amend would expire in twenty days after the service of the original answer, which was on the 19th of October.

I think, however, the plaintiff is regular. His amended complaint was served on the 26th of October, which was within twenty days after the service of the amended answer, which takes the place of the original. The latter is out of the case, being superseded by the amended answer, which is now to be regarded the only answer to the complaint. That was served on the 22d of October, and the plaintiff had twenty days from that time in which to amend the complaint. The plaintiff might not have wished to amend, if the original answer had been allowed to remain; and it may be that an amended answer has created the necessity of amending the complaint.

The motion is, therefore, denied. But as this is the first time the question has arisen under the code, that I am aware of, no costs are allowed.

Ordered accordingly.

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## SUPREME COURT.

LEVI SPEAR agt. CHARLES CUTTER.

Courts of equity will interfere by injunction to restrain waste or trespass, and to prevent injury to land, even where the title is in dispute and the right is doubtful, if the waste or trespass will be attended with irreparable mischief, or from the irresponsibility of the defendant or otherwise, the plaintiff cannot obtain relief at law. Such interference is placed upon the ground of preventing irreparable mischief, and the destruction of the substance of the inheritance.

An injunction was sustained where the plaintiff alleged that he was owner of the premises, that the defendant was committing waste by cutting down timber, &c., which would be an irreparable injury, and that he was insolvent, notwithstanding the defendant was in possession as tenant, under a decision in summary proceedings to recover possession of land, by a county judge, which the plaintiff defended, but had carried by certiorari to the Supreme Court for reversal, and which was pending and undetermined.

*Special Term, Washington County, Feb. 1849.*—Demurrer to bill; and motion to dissolve injunction founded on the bill alone.

The plaintiff alleges in his bill that he is the owner of lot No. 20, in Legg's Patent, that he and those under whom he claims, were in possession claiming title from 1833 to 28th of April, 1845; that for four years previous to this latter date, L. Bates occupied the lot as his tenant; that D. Russell on the 11th of November, 1844, instituted summary proceedings under the provisions of the Revised Statutes in relation to landlords and tenants, before a county judge of Essex county, to recover possession of the lot, and succeeded in dispossessing Bates; that the plaintiff defended the suit. And the plaintiff further alleges in the bill that he has sued out a certiorari for the reversal of such proceedings; but that no argument or decision has been had of the suit in the Supreme Court. And he further states in his bill, that he has been advised by his counsel that the affidavit on which summary proceedings were founded was not sufficient to give the county judge jurisdiction. The plaintiff further states that one-half of the lot is uncultivated, that its chief value consists in the timber standing and growing thereon; that the defendant has committed waste, by cutting down large quantities of such timber, which is now lying on said lot; and that unless he is restrained, he will continue to cut down such timber, whereby irreparable injury will be done to the premises; that the defendant is insolvent, &c. The plaintiff prays for an injunction staying further waste, and restraining the defendant from removing or disposing of the timber already cut on the lot.

PAIGE, Justice.—The defendant insists that as he is in possession claiming adversely to the plaintiff, and as the title is in dispute, an injunction bill to stay waste cannot be sustained. *Storms v. Mann*, 4 John. ch. 21, is cited in support of this proposition. In that case, the defendant had been in possession of the premises a long time, and was in possession at the time of the filing of the bill—and the plaintiff had commenced an ejectment at law, and the defendant had joined issue with the plaintiff on the question of title, and the action was pending and undetermined. But in the bill in that case, there was no allegation of the insolvency of the defendant, or that the waste which the defendant was committing would be an irreparable injury to the premises.

In this case, as appears from the bill, which is conceded by the demurrer to be true, the plaintiff is the owner of the premises in question, and, as such owner, was in quiet possession thereof from 1833 to the 11th November, 1844, when D. Russell commenced summary proceedings for the recovery of the possession; that the defendant is committing waste by cutting down the standing timber, which will be an irreparable injury

to the land; and that no remuneration for such injury can ever be recovered from the defendant as he is wholly insolvent. Unless, therefore, the injunction is sustained, the plaintiff, in the event of his being restored to the possession by a writ of restitution, will be entirely remediless. If it was necessary at this time to pass upon the affidavit on which the summary proceedings were founded, I should have little hesitation in pronouncing it insufficient to give the county judge jurisdiction. It fails to show that the relation of landlord and tenant existed between Russell and Bates; or even that Bates entered into possession under and by virtue of Russell's title. If the county judge did not acquire jurisdiction, the proceedings before him were entirely void; and the plaintiff's tenant was improperly and legally dispossessed. But, for the purpose of disposing of the demurrer, or of the motion to dissolve the injunction, I do not think it necessary to decide the question as to the sufficiency of the affidavit on which the summary proceedings were founded.

Courts of Equity originally declined to interfere by restraining waste or trespass where the right was doubtful, or the defendant was in possession claiming by an adverse title. (4 John. Ch. 22; Story's Eq. Jur. sec. 918.) But such courts have gradually enlarged their jurisdiction in such cases, and now they interfere to prevent injury to land, even where the title is in dispute and the right is doubtful, if the waste or trespass will be attended with irreparable mischief, or from the irresponsibility of the defendant, or otherwise, the plaintiff cannot obtain relief at law. (Story's Eq. sec. 918; *Hart v. Mayor*, 3 Paige, 214; *Winship v. Pitts*, id. 261; *N. Y. Print. & Dy. Est. v. Fitch*, 1 Paige, 99; Metf. 137; Story's Eq. § 916; *Hawley v. Clowes*, 2 John. Ch. 121; Story's Eq. § 928, and note 2; *Hawson v. Gardiner*, 7 Ves. 310-11; *Thomas v. Oakley*, 18 Ves. 184; *Livingston v. Livingston*, 6 John. Ch. 497; *Field v. Beaumont*, 1 Swans. 208.) The commission of waste of every kind, such as the cutting of timber, pulling down houses, working of mines, &c. is now a very frequent ground for the exercise of the jurisdiction of courts of equity, by restraining the waste, until the rights of the parties are determined. (Met. Pl. 137; *Livingston v. Livingston*, 6 John. Ch. 499 and 500, and cases cited by Chancellor Kent.) The interference by injunction in these cases is placed upon the ground of preventing irreparable mischief and the destruction of the substance of the inheritance. In *Livingston v. Livingston*, 6 John. Ch. 497, Chancellor Kent held that injunctions will be granted to prevent trespasses as well as to stay waste, where the mischief will be irreparable, and to prevent a multiplicity of suits. A court of equity will not sustain an injunction bill

filed merely to prevent the removal of timber wrongfully cut, or for an account for waste already committed, as the plaintiff has an ample remedy for such injury at law. But where the bill is filed to prevent future waste, and also to prevent the removal of timber already cut, or for an account for waste already committed, the court, to avoid multiplicity of suits, will decree an account and satisfaction for what has been done, and where the mischief to the plaintiff will be irreparable, will also enjoin the defendant from removing the timber already cut. (*Watson v. Hunter*, 5 John. Ch. 168.)

In this case as the defendant is insolvent, the injury to the plaintiff will be irreparable, if the defendant is permitted to remove or dispose of the timber he has already cut on the premises in question.

The plaintiff has no remedy under the Revised Statutes (vol. 2, 336, § 18,) by an application to the Supreme Court for an order restraining the defendant from the commission of waste. He has commenced no action for the recovery of the premises in question, to bring himself within the 18th section of the title relative to waste. (2 R. S. 336.)

The motion to dissolve the injunction must be denied; and the defendant's demurrer must be overruled, with leave to answer the bill in forty days after notice of the order overruling the demurrer, on payment of costs.

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## SUPREME COURT.

JAMES M. KEMP and JOHN A. FISKE agt. LEONARD HARDING.

To authorize the appointment of a receiver under § 298 of the code, the proceeding should be against the debtor, to reach his property generally; and should be *upon notice* to the debtor.

Such an appointment is not authorized on an examination under § 294, of third persons as to property of the debtor in their hands. Under this section, notice of the proceedings may or may not be given to the debtor, in the discretion of the judge.

In this proceeding (under § 294) there is no authority or provision for proceedings for the application of the property of the debtor to the payment of the judgment as is provided upon the return of an execution, and as is provided by the second paragraph of § 292. Neither is there any provision for an examination in this proceeding in relation to the property at large of the debtor.

*Onondaga General Term, Nov. 1849.*—C. GRAY, PRATT, GRIDLEY and ALLEN, Justices.—This is an appeal by the defendant from an order made by a county judge under chapter 2, title 9, part 2, of the Code of Procedure. The affidavit upon which the proceedings were instituted, stated

the recovery of a judgment in this court by the plaintiffs against the defendant, and the issuing of an execution thereon, which was unsatisfied, and that one Francis B. Morse had in his hands, notes and accounts of the defendant to the amount of several hundred dollars. Morse was thereupon summoned to appear before the judge to be examined concerning the notes and accounts in his possession belonging to the defendant, and upon his examination testified that as agent for his father, Charles D. Morse, he held notes and accounts which had belonged to the defendant, as security for a debt due from the defendant to Charles D. Morse. The attorney for the plaintiffs also testified as a witness, either upon the same or a subsequent occasion, that he had applied to the defendant to secure the judgment by turning out notes and accounts against his customers, which he declined, for the reason that he wished to secure all New York creditors alike. The judge thereupon made an order enjoining the defendant from making any such or other disposition of his property, and enjoining Francis B. Morse from transferring or making any other disposition of the notes and accounts in his hands, until a sufficient opportunity was given to the receiver appointed by said order to commence an action for the recovery thereof; and by the same order appointed a receiver of the property and effects of the defendant, and ordered him to appear and assign to such receiver, and ordered the receiver to convert the property of the defendant into money, and apply the same in payment of the judgment, and thirty dollars for the costs of proceedings. No notice of the proceedings was given to the defendant.

A. BENNETT, *for appellant.*

W. J. BACON, *for respondents.*

By the Court, ALLEN, Justice.—The general design of the chapter under which this proceeding was had, although by no means new, is benign and well conceived, and if carried out by proper provisions in detail, would prove, in many cases, a desirable improvement upon former practice; but the entire chapter is crude, imperfect and difficult of execution, and will require important amendments before the full benefit of the design will be realized. But crude and imperfect as the act is, I think it cannot be held upon any fair construction to authorize the order in this case as against the defendant.

The code has not in terms, and I think has not in spirit, altered the practice in the appointment of receivers, so far as notice to the party to be affected is concerned. By section 244, the court is authorized to appoint receivers "according to the present practice"—that is, the



practice of the Supreme Court in Equity, in force at the time of the adoption of the code, which was the same as that of the late Court of Chancery. By that practice, a receiver could not be appointed without notice to the party interested, except under peculiar circumstances, demanding immediate action, to be made to appear by the papers upon which the application was made—(1 Paige, 17; 2 Paige, 438, 450; 8 Paige, 373, 481)—and in such cases the receiver was appointed for the protection of property *pendente lite*, and the order did not, as in this case, assume to make a final disposition of the property without a hearing of the parties.

Section 298 authorizes the judge in a proceeding "supplementary to the execution," to appoint a receiver of the property of the judgment-debtor in the same manner as if the appointment was made by the court according to § 244. To authorize the appointment of a receiver under § 298: 1st. The proceeding should be against the debtor to reach his property generally, and not, as in this case, an examination, under § 294, of third persons as to property of the debtor in their hands—and 2d. The debtor should have notice of the proceeding. If the debtor has absconded, or cannot for any reason be served with a summons, under the act, the remedy must be by complaint in the nature of a creditor's bill, in which the debtor may be proceeded against as an absentee. Doubtless the Legislature might provide for proceedings under the act against a debtor who was not to be found, analogous to the proceedings by action against absentees, and for the protection of property that may be discovered in the meantime, but the misfortune in this case is, they have not done so, and anxious as we may be to further the design of the Legislature to simplify all judicial proceedings, we cannot infringe upon the province of legislation. These appear to be then different proceedings, "supplementary to the execution" authorized by the code—two under § 292, and a third under § 294. The two first are intended to compel the application of the property of the debtor in payment of the judgment, and the last, to ascertain the existence of property with a view to other and ulterior proceedings to compel its application. By § 292, the creditor may, upon the return of an execution unsatisfied, or secondly, upon the issuing of an execution and proof that the debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment, have an order for the examination of his debtor as to his property—and proceedings may be had in either case for the application of the property of the debtor towards the satisfaction of the judgment. In proceedings under this section, the appointment of a receiver would be proper, and is contemplated by the

act. By § 294, upon the issuing or return of an execution against the debtor, the creditor may, upon proof that any person is indebted to or has in his possession property of the judgment debtor, have an order for the examination of such person concerning the same, and of such proceeding, notice may or may not be given to the debtor, in the discretion of the judge. In this proceeding there is no authority or provision for proceedings for the application of the property of the debtor to the payment of the judgment, as is provided upon the return of an execution and as is provided by the second paragraph of § 292. Neither is there any provision for an examination in this proceeding, in relation to the property at large of the debtor. The design of the section was probably to enable the creditor to ascertain the property of his debtor in the hands of third persons, with a view to proceeding directly against the debtor under some of the provisions of § 292, to compel its application to the satisfaction of the judgment. The appointment of a receiver is not warranted either by the terms or the exigencies of this section. From an authority founded upon an allegation that a third person has in his hands certain property of the judgment debtor, for the examination of such person concerning the same, the power to make a final order, affecting and finally disposing of all the property of the debtor without notice to him, cannot be enforced.

So much of the order as enjoins the defendant and appoints a receiver, and directs the disposal and application of the property of the debtor, and awards costs to be paid out of his property, must be reversed. As the case arises under a recent act, obscure in its provisions, no costs will be given upon the appeal.

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### COURT OF APPEALS.

*Decisions—November Term, 1847—at the City Hall in the city of New York.*

ABEL FRENCH, Jr. plaintiff in error, v. ROBERT D. CARHART, defendant in error.—*Judgment reversed, venire de novo, by the Supreme Court; costs to abide the event.* JOHN VAN BUREN, for plaintiff in error. M. T. REYNOLDS, for defendant in error. This was a case in which involved the construction of a deed, containing a clause by which it was made subject to a reservation in a former conveyance of the same premises between other parties. The action was for overflowing land,

situated upon a creek called the Normanskill, in Guilderland, Albany county, by means of a dam, &c. (Reported 1 Comstock, 96.)

THE MOHAWK AND HUDSON RAIL ROAD COMPANY, plaintiffs in error, v. JOHN BROWN, defendant in error.—*Judgment reversed, venire de novo by the Supreme Court, costs to abide the event.* M. T. REYNOLDS, for plaintiffs in error; A. TABER and JOSHUA A. SPENCER, for defendant in error. This was an action of trespass on the case brought by Brown, the defendant in error, against the plaintiffs in error, for damages which accrued in the loss and injury to the plaintiffs' property, consisting of buildings, tan-works, &c., by a flood in the Mohawk river and Mill creek at Schenectady, where the plaintiffs' property was situated, and which he alleged was in consequence of the defendant's carelessly, unskilfully, insufficiently and unsafely making, keeping, maintaining and continuing their rail road, embankment and bridge along and across Mill creek, above where plaintiffs' premises were situated. The cause was tried before GRIDLEY, circuit judge, March 10, 1843, and a verdict rendered for plaintiff, Brown, for \$5,807.41. The defendants moved the Supreme Court for a new trial on a case and bill of exceptions, which was denied—BRONSON, chief justice, delivering the opinion of the court. The case is not reported in the Supreme Court or Court of Appeals. It was a question of evidence merely, including that of experts.

CORNELIUS VAN GIESEN, plaintiff in error, v. JAMES C. FULLER, defendant in error.—*Judgment affirmed.* C. TUCKER, for plaintiff in error; H. R. SELDEN and A. TABER, for defendant in error. This was an action of ejectment, and the principal question was, the legality of a sale under a decree of foreclosure—the land lying in different counties. (Reported 4 Hill, 171.) Not reported in Court of Appeals.

ERASTUS CORNING and JAMES HORNER, plaintiff in error, v. JAMES McCULLOUGH, defendant in error.—*Judgment reversed, and judgment for the plaintiffs on the demurrer to the defendant's second plea.* N. HILL, Jr. and D. BURWELL, for plaintiffs in error, J. C. SMITH and JOHN VAN BUREN, for defendant in error. The questions in this case were, in relation to the statute of limitations in suits against stockholders of a corporation sought to be charged individually, and the liability of stockholders. (Reported 1 Comstock, 47.)

ABIJAH B. CURTIS, plaintiff in error, v. JUSTUS B. JONES, defendant in error.—*Judgment affirmed in part and reversed in part, and neither party, as against the other, to have costs in this court.* M. T. REYNOLDS, for plaintiff in error; H. R. SELDEN, for defendant in error. This was an

action of replevin, in the *detinet*, in which the defendant avowed the detention of the property as a mechanic having a lien thereon for the manufacturing. And the question arose on demurrer, as to the sufficiency of the plaintiff's plea in bar, setting up a special agreement between them in answer to said avowry. (Reported 3 Denio, 590.)

JAMES FREELAND and others, plaintiffs in error, v. JAMES McCULLOUGH, defendant in error. This cause was submitted, without argument, to abide the event of the decision in the case of *Corning & Horner v. McCullough* above mentioned. The same question being involved. *Judgment reversed and judgment for the plaintiff on the demurrer to the defendant's second plea.* GEO. BOWMAN for plaintiffs in error, J. C. SMITH, for defendant in error.

WILLIAM G. WOOD, executor &c., plaintiff in error, v. GEORGE WEIANT and others, defendants in error.—*Judgment affirmed.* H. S. DODGE, for plaintiff in error, A. TABER, for defendant in error. This was an action of trespass for cutting timber, &c. The question was mainly one of boundary. The question upon which judgment was affirmed, was, as to the sufficiency of the proof or acknowledgment of a deed offered to be read in evidence. (Reported 1 Comst. 77.)

ELMER D. JENCKS, plaintiff in error, v. ISRAEL SMITH, defendant in error. *Judgment of the Supreme Court reversed, and that of the Common Pleas affirmed.* HENRY G. WHEATON, for plaintiff in error, WM. J. HOUGH, for defendant in error. This was an action of trespass, brought before a justice of the peace, by Smith against Jencks, for taking a quantity of hay, which Jencks claimed by virtue of a chattel mortgage. The questions were, as to the lien of the mortgage—being given upon the grass when growing. And whether the mortgage was properly executed. (Reported 1 Comst. 90.)

SYLVANUS H. HENRY, impleaded with OLIVER B. PIERCE, plaintiffs in error, v. THE PRESIDENT OF THE BANK OF SALINA, defendants in error. *Judgment affirmed.* WM. J. HOUGH, for plaintiff in error, N. HILL, Jr. and GEORGE F. COMSTOCK, for defendants in error. This was an action of assumpsit brought by the Bank of Salina against Henry & Pierce upon a promissory note signed by Pierce as principal and Henry as surety, payable to the bank and not negotiable. The defence was usury. The question was, as to the privilege of the principal witness, from testifying on the question of usury. (Reported 1 Comst. 83.)

HENRY COGGILL, plaintiff in error, v. DAVID LEAVITT, PRESIDENT OF THE AMERICAN EXCHANGE BANK, defendant in error.—*Judgment affirmed.*

This was an action of *assumpsit* brought by Coggill against the American Exchange Bank, to recover back the money which he, as the drawee and acceptor, had paid to the bank as the holders of a bill of exchange, upon which the name of the payee had been forged. The question was, whether the endorsement by the payee (whose name was forged,) was necessary, in order to transfer a good title to the party discounting the paper, or to entitle such party to receive the money upon it. (Reported 1 Comst. 118.)

SAMUEL S. DOUGHTY, plaintiff in error, v. THOMAS HOPE, defendant in error.—*Judgment affirmed.* A. THOMPSON, for plaintiff in error, R. MOTT, for defendant in error. This was an action of ejectment brought by Doughty against Hope, to recover possession of a house and lot situated in the 12th ward of the city of New York. The questions were in relation to the powers and proceedings of commissioners of estimate and assessment, in taking individual property for public improvement, &c. (Reported in 1 Comst. 79.)

(*To be continued.*)

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THE COURT OF APPEALS, at their present January term (1850,) have decided that the *dismissal* of an appeal is such a *judgment* of the court, as authorizes a *remittitur* of the proceedings to the court below, under § 12, of the code.

The case of *McFarland* agt. *Watson*, *ante*, 128, was alluded to as being incorrectly reported in that respect.

Two cases were decided upon motion, at this term, both of which presented the distinct point above mentioned; and both arose in consequence of an order dismissing the appeal, entered under rule 7, of the court. They will be reported in the next number.

## SUPREME COURT.

RALPH W. GOULD and others agt. OGDEN N. CHAPIN and others.

Section 125 of the code gives the court power to change the place of trial (in transitory actions) in the cases provided by statute. Section 49 of the Judiciary Act of 1847, is the statute to which this section of the code refers (*Lynch v. Mosher*, *ante*, page 86;) and provides that the court may, in a proper case, order any issue of fact joined in a cause to be tried in any county other than that named in the declaration (or complaint.) But such an order does not carry with it a change of the venue, (3 Howard's Pr. R. 71, 72; *ante*, page 81 and 86.) Nor change the place for making motions in the cause.

Section 401 of the code is a revision and substitute for § 51, of the Judiciary Act, (which required all motions to be made in the county in which the venue should be laid, or in an adjoining county,) and extends the territorial limits within which a motion may be made, to the entire district in which the action is triable.

Motions are therefore properly made in a cause in the district (or an adjoining county) in which the venue is laid, although the cause may have been tried in another district, by an order of the court changing the place of trial.

It seems that there is no statute under which the court can order an issue of law to be tried out of the county originally specified in the complaint, or that substituted under § 126 of the code.

There being no guide or test by which to determine what is within § 308 of the code a difficult or extraordinary case for additional allowance, it seems that it is the safest practice to deny the allowance in all doubtful cases, and to grant it only in those which, on account of their peculiarities or difficulties, plainly distinguish them from the great mass of litigated suits. (SPL. Justice.)

A referee's certificate that "the investigation and trial of the cause involved difficult questions of law," and which required and evidently received much examination and preparation on the part of the counsel of the respective parties," is not such evidence as to authorize a court to make an additional allowance. The court must know what the facts are which constitute such difficulties.

*Monroe Special Term, Dec. 1849.*—This is a motion on the part of the plaintiffs for an allowance in addition to costs, under section 308 of the code.

The action was for the value of goods belonging to the plaintiffs, alleged to have been lost through the negligence of the defendants, who received them as common carriers for transportation from New York to Albany.

The answer sets up that the defendants have not sufficient information as to the plaintiff's partnership, or as to the receipt by them of the property for transportation, to form a belief on the subject; and puts the plaintiffs to the proof of these allegations. It denies that the property

was lost by the defendants' negligence. It also alleges if the goods were ever received by the defendants, they were safely transported to Albany, taken from the vessel in which they were brought and delivered into the defendants' possession as warehousemen, and while they held them as warehousemen, they were, without the defendants' fault or negligence, destroyed by fire. It also alleges that the goods were directed to be forwarded west from Albany by a canal boat line, called the Atlantic line; that the agents of that line were, after the arrival of the goods at Albany, notified that the goods were ready for delivery to them on payment of the defendants' charges, and that after such notice the goods were lost and destroyed by the act of God.

The new matters set up in the answer were denied in the reply. This motion is made upon the pleadings, and an affidavit showing that the plaintiffs reside in Monroe county, and that county was designated in the complaint as the place of trial. That after issue joined, the place of trial was by an order of the court, upon the defendants' application and for the accommodation of his witnesses, changed to the county of Albany, where the cause was tried before a referee: and upon a certificate of the referee that "the investigation and trial of the cause involved difficult questions of law, and which required and evidently received much examination and preparation on the part of the counsel of the respective parties." There was a report for the plaintiffs of \$552.94.

The defendants' counsel read an affidavit made by the defendants' attorney, in which *he denies* that the cause was a difficult or extraordinary one; alleges that the time occupied in the trial did not exceed two hours; that the summing up on both sides occupied from two to three hours, and that the cause was decided by the referee within an hour after it was submitted to him. The affidavit also states that the referee's certificate was obtained *ex parte*, without any notice of an application for it to the defendants' attorney, but no objection was made to its being read on the motion.

H. R. SELDEN, *for plaintiffs*.

J. W. DWINNELLE, *for defendants*.

SILL, Justice.—Section 401 of the code provides that "motions must be made in the district in which the action is triable, or in a county adjoining that in which it is triable, except that where the action is triable in the first judicial district, the motion must be made therein."

It is insisted by the defendants that within the meaning of this section, this cause is triable in Albany county, and it is preliminarily objected that this motion cannot be entertained in the seventh district. The

plaintiffs reside in Monroe county, and that county was specified in the complaint as the place of trial. After issue joined on the application of the defendants, an order was made changing the place of trial to Albany county.

By section 142, of the code, the plaintiff is required to specify in his complaint the county in which he desires the trial to be had; and by section 125, in transitory actions the plaintiff, in designating the county, is limited to one in which a party to the suit resides, provided any of the parties reside in this state. In case these provisions of section 125 are disregarded, and some other county than the residence of a party is designated in the complaint as the place of trial, section 126 entitles the defendant to have the venue changed to the proper county, provided he demands it before the time for answering expires. It will be seen that this is not a case where the order to change the place of trial could have been made under section 126, and it must, therefore, have been done under the authority reserved to the court in the latter clause of section 125, where it is said that the place of trial is subject to be changed by the courts in cases provided by statute.

Section 49, of the Judiciary Act, is the statute applicable to such cases, and is the statute to which this clause of section 125 of the code refers, and the one under which the order in this case, changing the place of trial to Albany county, must have been made. (*Lynch v. Mosher*, 4 Howard, 86.)

It is to this section, therefore, that we are to look to determine the effect of the order in question. Section 49 of the Judiciary Act, provides that the court may, in a proper case, order any issue of *fact joined* in a cause, to be tried in any county, other than that named in the declaration or complaint. But such an order does not carry with it a change of the venue in the cause. (*Barnard v. Wheeler*, 3 Howard, 71, 72; *Beardsley v. Dickinson*, 4 Howard, 81; and *Lynch v. Mosher*, above cited.) The effect of the order in this case, was to send the issue of fact to Albany county for trial; and as a consequence, those proceedings in the cause, incidental to, and necessarily connected with the trial, went there also. But other proceedings were not affected by the order. The defendants' counsel contends that the order has the effect to change the venue and transfer the cause to Albany county; or, in other words, the cause is to be regarded as though Albany county had been originally designated as the place of trial. This is clearly not the case. I have already adverted to the distinction between a change of venue and a change of the place of trial under section 49, of the Judiciary Act, and referred to decisions showing that the venue in this cause still remains



in Monroe county. This distinction between the venue and place of trial was made important by the Judiciary Act, and was recognized and intended to be retained by the commissioners on practice, (see the first report, page, 128.) Under the Judiciary Act, a change of the place of trial, pursuant to section 49, did not change the place for making motions in the cause. That act provided that all motions should be made in the county in which the venue in the suit should be laid, or in an adjoining county, (§ 51.) Of this provision, the clause quoted above from section 401 of the code, is a revision and a substitute. This extends the territorial limits within the which the motion may be made, so as to embrace the entire district in which the action is triable. And it is plain that such extension was the only object of the revision. The latter section, indeed, speaks of the district where the action is triable, and not that where the venue is laid. But this change in phraseology does not necessarily indicate a design to change the practice; and this form of expression was adopted, not with a design to change the law, but it would seem to get rid of the word venue, which, inasmuch as it belongs to the vocabulary of technical legal language, it was thought advisable not to admit into the Code of Procedure.

The position of the defendants' counsel is also inconsistent with the latter part of section 49, of the act of 1847. This provision requires in cases like the present that the clerk of the county where the trial takes place, shall certify the minutes and they shall be filed in the county where the issue is joined; and the subsequent proceedings in the cause shall be had in that county as though the trial had taken place there. The county where the issue is joined, is of course that where the venue is laid, or in other words that specified in the complaint as the place of trial. (Rule 5, of 1847; Rule 3, of 1849.) Another consideration still, will show the impracticability of giving a general application to the views of the defendants' counsel on this point of practice. Issues of law and fact may now, as formerly, be joined in the same cause; and the examination of an issue of law is declared to be a trial. (Code, § 252.) There is no statute under which the courts can order an issue of law to be tried out of the county originally specified in the complaint, or that substituted under section 126 of the code. And the cause must, for this purpose, be triable in the district where the venue is regardless of any order that changes the place for trying an issue of fact. I am satisfied that the district in which the action is triable, within the meaning of § 401, is the district in which the venue is, and that this motion is properly made in the seventh district, in which Monroe county lies.

The referee's certificate and the pleadings in the cause are relied on to show that this is a difficult case, or an extraordinary one, in which the plaintiff is entitled to an allowance in addition to costs. We have no guide or test by which to determine what is within section 308 of the code, a *difficult* or extraordinary case; and as has been well remarked, there will be among the judges a great diversity of opinion, and as a consequence, no uniformity in the practice under this law. (*Hall v. Prentice*, 3 How. 328-9; *Sacket v. Ball*, 4 id. 71.) Such being the case, it is, in my opinion, the safest practice to deny the allowance in all doubtful cases, and to grant it only in those which, on account of their peculiarities or difficulties, plainly distinguish them from the great mass of litigated suits. From the pleadings, the present case does not appear to me to be singular in its character: and taken with the opposing affidavits, I think it is shown to be one of a class very common in our courts. Every case where a defence is honestly interposed, and a recovery seriously resisted, presents some difficulties, but it does not therefore necessarily come within section 208.

The referee's certificate (assuming that it may be properly used as the foundation of the motion) does not state what questions arose on the trial, nor what the questions of law were, which he deemed difficult ones. No one will, I think, contend that these questions are to be settled by the referee instead of the courts. The certificate states no fact upon which I can, for myself, form any opinion whether the case was a difficult one; and I am not satisfied, from the papers before me, that it is one of that difficult and extraordinary character which entitles the plaintiffs to an allowance beyond the statutory costs.

It was made a point also, on the argument of the motion, that the defence had been unreasonably and unfairly conducted. The plaintiffs claiming that, putting them to the proof of their partnership and of the delivery of the goods to the defendants for transportation, was evidence of unfairness. The refusal to admit the plaintiffs' partnership, does not appear to me to give the defence this character. There is nothing showing that the defendants had the means of knowing how the fact was, and I can see no impropriety in thus requiring the plaintiffs to prove it. I was, upon the argument, strongly impressed with the idea that the putting the plaintiffs to the expense of getting witnesses from New York to prove the delivery of the goods, was unreasonable on the part of the defendants, and perhaps should subject them to the additional allowance asked for. On recurring to the complaint, I find that it sets out an inventory of goods, such as are usually bought for retail in a country store, containing about

fifty items, varying in value from sixty-three cents to \$190. These goods were undoubtedly delivered to defendants in boxes, and it is not to be presumed that they were so well acquainted with the contents as to know whether the inventory contained in the complaint was or was not correct. They were not bound, in my opinion, to admit its accuracy; and the refusal to do so cannot, therefore, be unfair or unreasonable.

The motion must be denied; but as the questions presented are to some extent new, and the practice on them unsettled, it is without costs.

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### SUPREME COURT.

JOSEPH H. DAVIS agt. MARY S. R. TURNER, PETER R. CHEVALIER,  
WILLIAM E. HUNT and NICHOLAS SWITS.

A person examined as a witness before a referee, in a proceeding supplementary to an execution, in pursuance of §§ 295-300 of the code, is entitled to fees as a witness, as allowed by statute. (Laws of 1840, page 331, § 8.)

The remedy of the witness for his fees is against the party calling him; and it seems he is not bound to give evidence until his fees are paid.

The 301st section of the code does not authorize an application to a judge, in behalf of a witness, for his fees, and a fixed sum in addition.

*It seems* a person, not a party to the judgment, may be made a party to supplementary proceedings.

*It seems*, an action in the nature of a creditor's bill, against the judgment-debtor, and others colluding with him to defraud the creditor, may be commenced.

An application for costs cannot be made in a proceeding supplementary to an execution until the proceeding has been brought to an end in favor of the party so applying.

*Before WILLARD, Justice, at chambers, Dec. 19, 1849.*—On the 22d October, 1849, proof was made before Willard, Justice, that execution had been issued to the sheriff of Saratoga county, upon a judgment in favor of the plaintiff against the three first named defendants (the judgment roll being filed in the Saratoga clerk's office, and two of the above defendants being non-residents of this state,) and against the same defendants to the sheriff of Schenectady county, where the defendant Chevalier resides, for \$103.23, and that the executions remain in the hands of the said sheriffs wholly unsatisfied, and that those defendants have property which they unjustly refuse to apply towards satisfaction of the said judgment; and also that Nicholas Swits, residing in Schenectady, now has in his possession title deeds and other evidences of right and title of the said three defendants to said property, and that the said title deeds and other evidences

of such property were about to be removed out of this state; whereupon the judge issued an order, requiring the said judgment debtors and the said Nicholas Swits, to appear before a referee, at a time and place therein appointed, and produce the said title deeds and other evidences of title of property, and that they be examined by said referee, concerning the property of the judgment debtors; and that the referee inquire whether the said debtors refuse to apply their property to said judgment, &c. &c. And the said order also restrained all the defendants from assigning or disposing of said deeds or evidences of title, or removing them from this state, and that the judgment debtors refrain from selling their property, &c. The order was drawn in the usual form of orders, under § 292 of the code.

Swits, on a former day, appeared before the referee and was examined touching the matters mentioned in the order; witnesses also were examined before the referee. The proceedings are still pending before the referee and no report has yet been made by him.

On a subsequent day, BOCKES, in behalf of Swits, on an affidavit of the foregoing facts, applied to WILLARD, J., for an order on the plaintiff, to pay said Swits his fees and disbursements, for attending before the referee for examination, and also a fixed sum in addition, together with the costs of the motion. The judge made an order on the plaintiff to show cause why such order should not be made; and ELLSWORTH, for the plaintiff, showed cause. He contended that no order could be made by the judge under § 301, until the proceedings were completed.

BOCKES contended that Swits was in reality, only a witness, with no interest in the matter.

WILLARD, Justice.—If Swits was a mere witness and not a party to this proceeding, he is entitled to the same fees as any other witness, and no more; and his remedy is by action against the party by whom he was called. The 301st section of the code does not authorize a judge to make any allowance, on the application of a witness. (Monell's Practice, 365.) The 295th section enacts that witnesses may be required to appear and testify on any proceeding, under that chapter, in the same manner as upon the trial of an issue; and the act of 1840, p. 331, § 8, prescribes the fees to which they are entitled. The Revised Statutes (2 R. S. 400, § 42) direct the mode of serving a subpoena, and specify what fees in advance shall be tendered before the witness can be required to attend. If he appears without process he is not bound to be sworn and give evidence, till his fees are actually paid. (3 Bl. Com. 369.)

But I think Swits was a *party*, not indeed to the original *action*, but to

this *supplementary proceeding*. The code divides remedies into *actions* and *special proceedings*. (§ 1.) The proceedings supplementary to an execution (Code, § 292) are of the latter character. They are usually instituted by the judgment creditor against the judgment debtor; but other persons may, it is believed, be made *parties*. The name *plaintiff* and *defendant*, is, by the 79th section, made applicable to parties to a *civil action*. But there must be parties to a special proceeding; and there is nothing in the code which prohibits the calling of the complaining party by the name of plaintiff and the adverse party by that of defendant.

This proceeding was reported by the commissioners on practice and pleading, as a substitute for a creditor's bill, and was supposed to be so plain as to require no explanation. (See 1st Report of Com. on Practice and Pleading, 201.)

There were two species of creditor's suits well known to the chancery practitioner. The first kind embraced suits brought for the administration of assets, to reach property fraudulently disposed of, &c. The bill in such cases was filed on the behalf of the complainant, and all others standing in similar relation, who might come in under such bill, and the decree to be made. It might be filed by simple contract creditors, and did not require a judgment to have been obtained. (2 Barb. Ch. Pr. 149.) The second kind, though existing before the Revised Statutes, as was declared in *Hadden v. Spader*, (20 J. R. 554,) was regulated by those statutes, (2 R. S. 173.) It was an action given to a judgment creditor, who had exhausted his remedy at law, to obtain discovery and relief against the judgment debtor and any other persons having property or rights in action in trust for, or belonging to the debtor. It enabled the creditor to reach things in action, not tangible by common law execution, and to remove obstructions which fraud had interposed to its collection.

Neither of these species of creditors' suits is abolished by the code. The first is substantially recognized by § 119 of the code; and there can be no doubt that the other may be adopted at the election of the creditor, but it must be conducted according to the existing system of pleadings and process. In cases where the sole object of the creditor is to examine the debtor, the proceedings authorized by the present code, will afford in general, an adequate remedy. But if the creditor wishes relief against a third person who has colluded with the debtor, this proceeding will be wholly ineffectual unless such person can be made a party. In such case an action in the nature of a creditor's bill may be resorted to, making all persons parties who have an interest in the controversy, according to § 118.

But I incline to think that under the code of 1849, other persons besides the judgment debtor may be made a party to the proceedings supplementary to the execution. In the first report of the commissioners this does not seem to have been contemplated.

The 256th section of the report authorized the judge "to allow to any party or witness so examined, his travelling expenses and a fixed sum in addition, not exceeding — dollars, as costs." As the creditor could not be examined, no costs could be allowed to him, under any circumstances. The judgment debtor was entitled to his travelling expenses, and a fixed sum besides, which was left blank in the report, whether he succeeded or not. It was amended by the Legislature, and adopted in the code of 1848, in this form. "The judge may allow the judgment creditor, or to any party or witness so examined, his travelling expenses, and a fixed sum in addition, not exceeding thirty dollars as costs." Thus the judge was authorized to allow to the judgment creditor, as well as any other party or witness, his travelling expenses and a fixed sum besides. There was nothing to prevent a judgment creditor, residing in a remote part of the state, from instituting this proceeding before a judge residing at a fashionable watering-place, in the interior or on the seaboard, and to charge his travelling expenses and the like, for his witnesses. It was not stated when, or under what circumstances, these allowances should be made, or by whom they should be paid, or out of what fund.

Some of these objections are obviated in the amended code of 1849. Section 301, which is a substitute for the former section 256, reads thus: "The judge may allow to any judgment creditor, or to any party so examined, *whether a party to the action or not*, witness-fees and disbursements, and a fixed sum in addition, not exceeding thirty dollars, as costs." Fees and disbursements are well understood in the law. They embrace the fees paid to the referees and to witnesses, the sums paid to clerks for copies of records and the like, (see code, § 311 to 313, and the fee bill of 1830, 2 R. S. 621 to 650; Session Laws of 1840, p. 331, § 8.) Clearly, the Legislature did not intend that the judge should allow to a witness his disbursements and thirty dollars besides. The amended code, doubtless, intended to leave the witnesses' fees to be provided for under the general law, and to allow the prevailing party to recover the witnesses' fees and other disbursements, and a fixed sum in addition, not exceeding thirty dollars, as his costs.

If this be the true construction, the judge may, when the proceeding is brought to a close, allow to the *judgment creditor*, if he be the prevailing party, the fees he has been liable to pay to his witnesses and the referee,

and his disbursements for exemplifications of records, serving subpoenas, and the like, and a fixed sum besides, not exceeding thirty dollars, as his costs. This latter sum was probably intended to cover the whole expense paid to his attorney in conducting the proceedings.

But suppose the judgment creditor fails, and the judge dismisses the proceedings; certainly he should not then be entitled to costs, but justice would seem to require that he should pay costs. Then the other branch of the section comes into operation: the judge may allow to any *party* so examined, whether a *party to the action* or not, his witnesses' fees and disbursements, and a fixed sum in addition, not exceeding thirty dollars, as his costs. Here is a direct implication that there may be a *party* to this proceeding, who is not a *party* to the original action; and he is placed on the same footing as to costs, with the original *party* to the action. This is in conformity to the practice in creditors' bills, where persons, other than the judgment debtor were made parties.

There is nothing in sections 294 and 297 in conflict with this view of the matter. On the contrary, it will sometimes be a protection of the party indebted to a judgment debtor to be made a party. The order of the judge requiring him to pay to the judgment creditor, will be a part of the record of the proceeding, and will afford him a permanent voucher of the validity of his payment. If the person alleged to have property of the judgment debtor, or to be indebted to him claims an interest in the property, adverse to him, or denies the debt, such interest or debt must be recoverable only in an action against such person or corporation by the receiver; but the judge may, by order, forbid a transfer or other disposition of such property or interest, till a sufficient opportunity be given to the receiver to commence the action, and prosecute the same to judgment and execution, (Code, § 299.) The was the usual course under creditors' bills before the code. (See 1 Barb. Ch. Pr. 659.) The Court of Chancery never appointed a receiver unless a cause was depending, except in cases of idiots and lunatics, with respect to whom the jurisdiction was a peculiar one. (1 Atk. 489; 2 ib. 315.) The 299th section has thus enlarged the power of a single judge, and allowed the appointment of a receiver, in a special proceeding.

It was not necessary that every person indebted to the judgment debtor, should be made a party to a creditor's bill; nor is it necessary that every person indebted to a judgment debtor should be made a party, under the proceedings now under consideration. All that is meant to be decided is, that cases may arise in which a person, other than the judgment debtor, *may be made a party*. The creditor will, in general, be cautious not *un-*

*necessarily* to make a man a party, lest he be compelled to pay costs to such party.

If, then, Swits was a party, other than a witness, it remains to be considered in what stage of the proceedings he is entitled to move for costs. The code is silent on this point; but in conformity to the analogy of the law in other cases, he cannot move until the proceeding is brought to a close as to him, and has terminated in his favor. Costs are never granted on a motion, until the motion is decided, nor in an action until judgment. (See Code, § 303 to 322.)

Whether Swits was *rightfully* made a party, or not, it is unnecessary now to determine. His name was inserted in the title of the proceedings; he was charged with acts prejudicial to the plaintiff; and relief was sought against him. All these are indications that he was treated as a party.

The motion is prematurely made, but as the question is new, it must be denied without costs and without prejudice.

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JOHN E. BOICE agt. MARY S. R. TURNER et al.

This case is exactly like the preceding, and must be decided the same way.

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### COURT OF APPEALS.

ABRAHAM WAGENER, ex'r of John Supplee, Respondent, agt. GILBERT R. REILEY and others, Appellants.

An order of the Supreme Court reversing a final decree of a surrogate in a proceeding for an account, and directing the proceedings to be remitted to the surrogate with instructions, &c. is an appealable order to this court.

*September Term, 1849.*—The surrogate made a final decree in a proceeding for an account. On appeal, the Supreme Court, at general term, reversed the decree, and directed the proceedings to be remitted to the surrogate, with instructions to proceed and settle the accounts of the executor upon certain specified principles. From the decree of the Supreme Court, Reiley and others appealed to this court.

S. H. WELLES, *for the respondent*, moved to dismiss the appeal, on the ground that the decree of the Supreme Court was not final, (Code, § 11, 245,) because an account was to be taken before the surrogate.

G. F. COMSTOCK, *for appellants*.

THE COURT held that it was a case for an appeal, and denied the motion.



## SUPREME COURT.

GEORGE BELDING agt. ISAAC CONKLIN.

*The necessary disbursements and fees of officers allowed by law, under the code, cannot be recovered by the prevailing party, where he is not allowed to recover costs.*

*Held*, that all the sections referring to this subject, are consistent with the doctrine that *costs*, as the term is used in the code, are composed, 1st. Of the certain sums allowed in lieu of lawyers' fees. 2d. Of the fees of officers. 3d. Disbursements—such as postages, witnesses' fees, printing bills, &c.—BARCULO, *Justice*.

In an action for slander, where the plaintiff recovered but six cents damages, *held*, that he was not entitled to recover, under the code, *the necessary disbursements and fees of officers*, but only six cents costs.

[It will be seen that the decision in this case is directly adverse to the one in *Taylor and wife agt. Gardner*, ante, page 67, and *Newton agt. Sweet et al.* ante, page 134.]

*Dutchess Special Term, Dec. 1849.*—This was an action of slander, tried at the Dutchess circuit, in October, 1849. A verdict was rendered for the plaintiff of *six cents*. In entering up the judgment, the clerk inserted the plaintiff's disbursements and officer's fees, to the amount of \$77. 12. The defendant now moves to strike out this allowance upon the ground that it is not allowable under the code.

S. DEAN, *for defendant.*

WM. ENO, *for plaintiff.*

BARCULO, *Justice.*—It is admitted that under the former statutes the term "costs" embraced the fees of attorney and counsel and of all officers, as well as the disbursements allowed by law. It is also conceded, that under the former practice the plaintiff in this case could only recover six cents costs, and could not recover the fees of officers and disbursements allowed by the clerk.

The reason that the law did not allow any more costs than damages in such cases, seems to have been, that the plaintiff did not show himself to be *sufficiently in the right*, to be entitled to recover his expenses from the opposite party. The propriety of the suit was supposed to be evidenced by the amount of the verdict. If the jury gave damages to the amount of fifty dollars, the action was deemed meritorious, and full costs were awarded. If the verdict was less than fifty dollars, the plaintiff could recover no more costs than damages; and was only excused from the payment of costs, by the cause of action being beyond the jurisdiction of a justice's court.

But it is contended, on the part of the plaintiff, that the code has introduced a new rule, and affixed a new meaning to the term "costs." It

becomes necessary, therefore, to look carefully into this act in order to ascertain whether the Legislature have really made an innovation which involves the inconsistency and injustice of denying to the plaintiff the small sum allowed in the place of attorney and counsel fees, and giving him the larger sum of disbursements.

The law on this subject is found in title X. of the code, entitled "of the costs in civil actions. The first section (§ 303) repeals the former statutes regulating the fees of attorneys, solicitors and counsel, and in lieu thereof provides that "there may be allowed to the prevailing party, upon the judgment, certain sums by way of indemnity for his expenses in the action; which allowances are in this act termed costs." It is proper here to remark that the object of this allowance, termed costs, is to *indemnify* the party for his *expenses*, which consist quite as much of the fees of witnesses and officers, as of lawyers; and it would be passing strange if the Legislature should deem the charges of lawyers entitled to special protection. Again these costs are to be allowed to the *prevailing party*, that is the party who prosecutes a meritorious action, or defends successfully.

But it is said that this section gives a new *definition* to the word costs, which runs through the code. I do not so understand it. There is nothing in the language which necessarily excludes the fees of officers and disbursements from the term *costs*, generally. Let us suppose that, in fixing the fees of referees at three dollars a day, the Legislature had added, "which allowance is in this act termed costs:" would this phrase have been equivalent to declaring that *nothing else should be termed costs*? Clearly not. The fees of every officer, spoken of *severally*, are properly called *costs*; and when they are all collected together they constitute a *bill of costs*. And I apprehend that the framers of the section in question did not mean to restrict the word costs *generally* to the allowance for attorneys', solicitors' and counsel fees, but merely intended to affix that meaning for the purposes of brevity and precision in adjusting the rates of allowance made in section 307. Indeed, it is quite manifest that the only sections in the whole title in which the term is used in a limited sense, are sections 307 and 311. In all the other sections it is used in its ordinary comprehensive sense, defined by Webster to be "the sum fixed by law or allowed by the court for charges of a suit awarded against a party losing in favor of the party prevailing."

Thus in section 304, there is nothing that indicates an intention to restrict the term: but the contrary is evinced by the provision that in certain cases "no costs *other than disbursements* shall be allowed." The whole of this section is very nearly a transcript of the former acts, and

I am unable to discover any intention on the part of the law-makers to alter its construction. I have no doubt that when provision was made, giving costs to the plaintiff in an action to recover real property, &c., the code-makers intended to embrace the fees of officers and disbursements to the same extent as was allowed under a similar section of the Revised Statutes. And I am just as well satisfied that, in enacting that the plaintiff should recover no more costs than damages in an action of slander, if he recovers less than fifty dollars, reference was had to the existing rule: and that it was intended to allow no more costs of any kind than damages, and that it was never contemplated that, in addition to a gross sum as costs, and equal in amount to the verdict, there should be allowed a large sum as fees of officers and disbursements.

In the next section, which declares that costs shall be allowed of course to the defendant, unless the plaintiff be entitled to them, the term is obviously used in a general and not in a restricted sense; and includes disbursements and fees of officers. For, otherwise, it might, in many cases, be doubtful which party should recover disbursements, &c. For instance, in an action to recover money, if the plaintiff recover a sum less than fifty dollars, the defendant is entitled to costs. But, if costs are limited to the fixed sum given in lieu of attorney and counsel fees, which party is to recover disbursements and fees of officers? The plaintiff prevails perhaps to the extent of forty-nine dollars; and if it is true, as has been said, that it matters not to what extent he prevails, if he prevail at all, he is entitled to his disbursements, &c., then it might follow, that the defendant would be entitled to recover costs and the plaintiff recover disbursements, &c.; which is an absurdity hardly to be presumed. The only mode of escaping this dilemma is to say that the *prevailing party* is the party *entitled to full costs*, which, as I shall hereafter show, is entirely inconsistent with the doctrine that disbursements follow a recovery of six cents in an action of slander.

So in section 306, which makes costs discretionary in certain cases, the word is manifestly used in its ordinary sense.

Section 307 is one of those in which its meaning is limited. The true sense of that section may be thus expressed. "When full costs are allowed, the sum fixed as an indemnity for the expenses of employing legal aid, shall be as follows."

Section 310 directs the clerk to add the interest on a verdict for money to the costs of party entitled thereto. I think there can be no doubt that the word costs here refers to the *bill of costs*, and not to the gross allowance.

We now come to section 311, upon the construction of which this question depends. It provides that "the clerk shall insert in the entry of judgment, on the application of the *prevailing party*, upon two days' notice to the other, the sum of the charges for costs, *as above provided*, and the necessary disbursements and fees of officers allowed by law, including the compensation of referees and the expense of printing the papers upon any appeal."

This language, it is contended, secures to the plaintiff his disbursements, &c. in this case. Its meaning obviously turns mainly upon the interpretation put upon the phrase *prevailing party*. This phrase can only mean the party entitled to the allowances "above provided" in section 307. In other words, it refers to the party entitled to *full costs*. It cannot mean the party who prevails upon the verdict, unless he prevails so as to be entitled to full costs. For, as before stated, a party recovering forty-nine dollars in an action for the recovery of money, is the prevailing party upon the verdict, but not as to costs. The defendant is the real *prevailing party*, because he is entitled to costs; and consequently he, and not the plaintiff, is entitled to recover his disbursements and fees of officers.

But let us illustrate this a little further. We will suppose that section 311 has been omitted. The law would then have stood substantially as it did before, with the exception of the fixed allowances given by section 307 instead of lawyers' fees. The costs would then have to be taxed by a taxing officer, under the same rules and principles as formerly governed. No one would have pretended that any change had been made in respect to the allowance of disbursements, &c.; nor would any one have claimed that they could be recovered by a party not entitled to full costs.

Now, the whole object of section 311 was to substitute the clerk in the place of the *taxing officer*. The clerk is now to fix the amount of costs; and although the word *tax* is no longer used, the substance of the duty remains the same as before. In order to make this duty plain, the code specifies the items of costs to be allowed by him to the prevailing party. He is to take the gross sum of charges given by section 307, to which he is to add the per centage, if any is allowed, the fees of officers according to the services performed; the fees of referees, if any, the fees of witnesses and other disbursements, as they appear by the affidavits produced. These all added together constitute the *bill of costs*.

It is a perversion of language to say that because the clerk is directed to insert the sum of the charges for costs, as before provided, and the disbursements, &c., therefore these latter are *not costs*. With equal propriety

might it have been said, under the old statute, that sheriff's and clerk's fees, taxed in with the attorney's allowance of ten dollars on a judgment by default were not costs.

Section 315 authorizes the court to award costs on a motion not exceeding ten dollars. Can it be supposed that this sum is not to include disbursements? Can it be contended that, when such costs are entered into a final judgment, the clerk can add thereto the postages and clerk's fees on the motion?

Again, section 316 renders a guardian responsible for the costs which may be adjudged against an infant plaintiff. Are we to say that the term is here used in a restricted sense, so that he is only liable for the trifling sum fixed as an indemnity for lawyers' fees?

And in regard to sections 317, 318, 319, 320 and 321, which provide for costs against executors—costs of special proceedings brought into this court by appeal—costs in actions prosecuted in the name of the people—and for costs against the assignee of a cause of action; it is quite clear that the word *costs* is used in its broad sense, and includes all fees and disbursements. Any other construction would make mere nonsense of all of these sections.

Numerous other provisions of the code, in regard to the undertakings to be given in various stages of an action, to pay the costs which may be awarded against the principal, would be substantially annulled, by affixing the new interpretation to the term costs.

I am not prepared to believe that the Legislature could have intended or expressed so great an absurdity. Nor do I deem it our duty to endeavor to force such a construction upon ambiguous language, against manifest justice as well as the settled practice.

My attention has been particularly called to the case of *Taylor v. Gardner*, 4 How. 67, and *Newton v. Sweet*, 4 How. 134. But after having carefully looked through them, I am unable to discover any sound principle upon which those provisions can be sustained. In the latter case, the learned justice concedes that such a construction as he adopts seems to be inconsistent with numerous provisions of the code; but he claims that "there are other provisions, such as the 301st and 371st sections, which plainly recognize the distinction between allowances for costs and fees for disbursements." In regard to both these sections, I must say, that I think that they are more consistent with the meaning here given to the term costs, than with the view taken by the learned justice. Section 301 authorizes the judge in certain cases to "allow to the judgment creditor or to any party so examined, whether a party to the action

or not, witnesses' fees and disbursements, and a fixed sum in addition, not exceeding thirty dollars, as costs." Now it may be remarked, in the first place, that it is not absolutely certain that the last two words of this section do not refer, as well to the witnesses' fees and disbursements, as to the fixed sum of thirty dollars. But supposing it to refer exclusively to the latter, does it exclude the idea that witnesses' fees and disbursements are also *costs*. I think not. On the contrary it is quite consistent, in my judgment, to say that a fixed sum should be allowed as costs, and the witnesses' fees and disbursements in addition, also, as costs. This is merely describing what kinds or items of costs are allowable in such cases.

Section 371 declares that "the following fees and costs, and no other, *except* fees of officers, shall be allowed on appeals," to a county court. So far from this section drawing a "distinction" between costs and fees, it seems to me clearly to recognize the *fees of officers* as costs. The very exception shows that what follows is of the same nature as that which precedes. One item of costs, however, *in this section*, is not allowed, viz., disbursements.

These sections are all consistent with the doctrine that costs, as the term is used in the code, are composed,

1. Of the certain sums allowed in fees of lawyers:
2. Of the fees of officers:
3. Disbursements, such as postages, witnesses' fees, printing bills, &c.

In the first part of section 371, the prevailing party is allowed the first and second of these items of costs, but disallowed the third. But in a subsequent clause, where the court is permitted to award an amount not exceeding ten dollars, the term includes *all* the kinds of costs: and the clause does not authorize the awarding of ten dollars as a substitute for lawyers' fees, and also the fees of officers and disbursements in addition thereto.

I am fully sensible of the inconveniences arising from conflicting decisions in the different branches of this court. But greater evils must flow, in my opinion, from adhering to a decision which essentially changes the meaning of a term so frequently used in the law. I feel at liberty, therefore, to adopt what I consider the true interpretation of this statute.

I may add that on consultation with my brethren of this district, since writing the foregoing, I have reason to believe that they concur in this view of the law. Justice McCoun has recently decided the same question in Westchester, accordingly.

The disbursements and fees of officers cannot, therefore, be allowed; and the motion to strike them out is granted, without costs of motion.

## SUPREME COURT.

IRA BENTLEY vs. WM. L. JONES and IRA ALLEN.

An allegation in a pleading that a party to an action is not the real party in interest, is bad upon demurrer; for the reason that the allegation does not involve a traversable fact, but merely a conclusion of law.

*Held*, that this principle was applicable to an allegation in the plaintiff's reply, which was as follows: "*but the plaintiff denies that the said Zebulon Jones has any interest whatever in the premises mentioned in the complaint in this action.*" Which was demurred to by the defendant, on the ground that the reply did not show how Zebulon Jones became divested of his interest acquired by virtue of a certain deed, &c., and having an interest, he was a necessary party, &c. The demurrer held to be well taken.

*Rensselaer Circuit, Dec. 1849.*—Demurrer to the plaintiff's reply to the answer of the defendant Ira Allen. The following facts appear from the pleadings. The plaintiff and Silas L. Jones, being the owners as tenants in common of the premises described in the complaint: on the 11th day of October, 1843, executed a mortgage upon the premises to David Buel, Jr., to secure the payment of \$400. The mortgage was assigned on the 1st day of May, 1847, to Porter G. Dennison, and on the 9th day of April, 1849, to the defendant William L. Jones. On the 4th of April, 1848, the plaintiff filed his bill against Silas L. Jones, for the purpose of having a partition of the premises, and also for the purpose of charging the share of Silas L. Jones in the premises with the payment of the mortgage; alleging in the bill that the mortgage was given for the benefit of Jones, as the principal debtor therein, and that the plaintiff executed the mortgage as security for Jones. A decree was made in that suit on the 3d of April, 1849, confirming the report of commissioners appointed to make partition whereby a portion of the premises was allotted to Silas L. Jones, and the residue to the plaintiff. By the terms of the decree, the portion allotted to Jones was charged with the payment of the mortgage. No notice of the pendency of the suit for partition was filed until the 13th of March, 1849. The notice then filed stated that the bill had been filed for the purpose of obtaining a partition and division of the premises therein described among the owners thereof, according to their several and respective rights and interests therein.

On the 14th of September, 1848, Silas L. Jones and his wife conveyed to Zebulon Jones the equal undivided half of that part of the premises which, in the partition subsequently made, was allotted to the plaintiff. The deed was recorded on the 2d day of October, 1848.

On the 6th of September, 1848, Silas L. Jones and his wife conveyed to the defendant, Allen, the undivided half of that portion of the mortgaged premises, which, in the partition, was allotted to Silas L. Jones. This deed was also recorded on the 2d day of October, 1848.

William L. Jones, as assignee of the mortgage, commenced proceedings by advertisement under the statute for the foreclosure of the mortgage, prior to the commencement of this suit, which was on the 8th day of June, 1849. It is alleged in the complaint that Allen, when he purchased of Silas L. Jones, assumed the payment of the mortgage as a part of the consideration to be paid by him and the plaintiff, claims, that upon any sale which may be necessary to satisfy the mortgage, the portion of the mortgaged premises conveyed to Allen, be first sold, and next, that the other half of the same premises be sold.

The defendant, Allen, in his answer, alleges that "*at the time of commencing this action, Zebulon Jones was, and that he still is, the owner in fee of an equal undivided half of that portion of the mortgaged premises allotted to the plaintiff by the decree in partition; and that he is, and was, from the date and delivery of the deed to him by Silas L. Jones, united in interest with the defendant, Allen, and the owners of the land covered by the mortgage, in respect to the mortgage and its liquidation and payment out of the lands covered thereby; that "with the said Zebulon Jones, if at all, joined as defendant and not without such joinder, the defendant, Allen, is liable."*

It is also denied that the defendant, Allen, undertook, promised or agreed to pay off or satisfy the mortgage, or any part of it, as a part of the consideration of his purchase. The other statements in the answer are not material to the question presented by the demurrer.

The plaintiff, in his reply to the answer of Allen, says "*that if Zebulon Jones had such interest as is described in the answer of the defendant, Ira Allen, in the premises in question, such interest would not be affected by having the premises sold to the said Ira Allen, as mentioned in the complaint, first sold under the said mortgage, as it is not alleged or pretended, in and by the answer of the said Ira Allen, that the said Zebulon Jones has any interest whatever, in the premises which, by this action, the plaintiff herein seeks to have first sold under said mortgage, but the plaintiff denies that the said Zebulon Jones has any interest whatever in the premises mentioned in the complaint in this action.*

The defendant, Allen, demurs to "*so much of the reply as seeks to avoid the joinder of Zebulon Jones as a defendant by denying "that the said Zebulon Jones has any interest whatever in the premises mentioned in the*



*complaint in this action.*" The grounds of demurrer are, that the reply does not show how Zebulon Jones became divested of his interest acquired by virtue of the deed from Silas L. Jones, and having an interest, he is a necessary party to a complete determination of the rights of the parties, and the defendant, Allen, is interested in having him before the court.

J. HOLMES, *for plaintiff.*

H. P. HUNT, *for defendant Allen.*

HARRIS, Justice.—The plaintiff having omitted to file a notice of the pendency of his suit for partition, neither the defendant, Allen, nor Zebulon Jones, can be charged with having constructive notice of that suit when they took their conveyances. They are not, therefore, to be affected by the decree in the partition suit, unless they purchased under such circumstances as would amount to actual notice of the suit and its object. Such actual notice, if alleged, is not admitted, and, for the purpose of this decision, it is to be assumed, that neither Allen nor Zebulon Jones is thus chargeable with notice. As between the plaintiff and Allen and Zebulon Jones, the plaintiff is at liberty, on the one hand, to insist that the undivided half of the mortgaged premises conveyed by the deeds executed by Silas L. Jones to Allen and Zebulon Jones, is equally chargeable with the payment of the entire amount of the mortgage. On the other hand, they are at liberty to insist that the plaintiff is in equity bound to pay one-half of the mortgage. Neither party is concluded by the decree in partition. So, also, as between themselves, Allen and Zebulon Jones may each insist that the portion of the premises conveyed to the other is primarily chargeable with the payment of that part of the mortgage which Silas L. Jones, as between him and the plaintiff, was bound to pay, or that the premises conveyed to each, are alike liable to contribute to such payment. As the case stands upon the pleadings, these, and perhaps others, are open questions which the parties have yet the right to litigate, and have determined upon equitable principles. And if this be so, it follows that Zebulon Jones is a necessary party to the litigation. Without having him before the court, no complete determination of the rights of the parties can be made. I think Allen had a right, therefore, to take the objection that Zebulon Jones should have been made a party to the action.

To avoid this objection, the plaintiff has denied that "Zebulon Jones has any interest whatever in the mortgaged premises." Whether he has or not is a question of law which the court is to determine, when the

facts are before it. I have just had occasion to hold, in *Russell v. Clapp*, that an allegation in a pleading that a party to an action is not the real party in interest, is bad upon demurrer. It is so, for the reason that the allegation does not involve a traversable fact, but merely a conclusion of law. I think the question presented by this demurrer is within the principle of that decision. What is the issue which the plaintiff here tenders? It is, whether or not Zebulon Jones has any interest in the mortgaged premises. To determine this, it must be ascertained whether the conveyance to him by Silas L. Jones is valid, and if it is, whether he has been legally divested of the interest thus acquired. The facts which are to be established in order to determine these questions, are the proper subjects of pleading and not the inferences which the court may derive from those facts, when properly pleaded and proved.

My conclusion is, that the defendant Allen is entitled to judgment upon the demurrer, but the plaintiff is to be at liberty to amend his reply within ten days after notice of this decision upon payment of the costs of the demurrer and subsequent proceedings.

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## SUPREME COURT.

LEMUEL JENKINS agt. WILLIAM MCGILL.

It is the duty of a sheriff to return process to the proper office. If he does not do so personally, he must see that it is done. If sent by mail, he must *pay the postage* on the letter containing it.

A clerk is not required to take a letter from the post office, containing process returned by a sheriff, where the postage is unpaid.

*Albany Special Term, Dec. 1849.*—This was an application, on affidavit and notice, under rule 6, for an attachment against the sheriff of the city and county of New York, for not returning a writ of *feri facias*. The motion was resisted on the affidavit of the under sheriff of New York, showing that a return was duly endorsed on the execution, which was enclosed in an envelope, directed to the clerk of the county of Albany, and mailed at the New York post office. It did not appear that the postage was paid, and the execution was not on file in the Albany clerk's office. It was further shown that an action was also pending against the sheriff, for not levying and returning the execution.

H. S. McCALL, *for plaintiff*.

O. MEADS, *for the sheriff*.

PARKER, Justice.—The first question presented is, whether it is a compliance with the duty imposed on a sheriff, to mail an execution directed to the proper clerk's office, without paying postage on the letter. I do not think it is. The sheriff is required to return the execution to the office. He may do so personally; at all events he must see that it is done, and be held responsible for its performance. He is as much bound to see to the return of process, as he is to the faithful delivery of a person, whose body he is required to have at a time and place specified in the writ. A county clerk is not bound to take from the post office a letter from a sheriff containing process, on which the postage is not paid. The letter therefore miscarries, and the process is lost. It would certainly be no defence to a sheriff, sued for not returning process, that the plaintiff's attorney had failed to advance him the money to pay postage on his letter to the clerk. If that is a good defence, no such action, heretofore brought, was ever maintainable. Both parties have a right to require that the process be actually returned. I believe it is customary for the sheriff, under instructions from the plaintiff's attorney, to enclose to him the process by mail with the return duly endorsed. Such a practice is the most convenient for all concerned.

The sending of the execution to the clerk, postage unpaid, is therefore no answer to this application for an attachment, though, being done in good faith, it may be a good reason for relieving the sheriff hereafter on equitable terms.

Nor is it any objection to the granting of this motion, that an action is now pending against the sheriff for a failure to levy and return the execution. The plaintiff has a right to compel the return, to aid him as evidence in prosecuting the action. (*Dygart, Sheriff, ad. Crane*, 1 Wend. 534.)

The motion must therefore be granted with \$10 costs.

## COURT OF APPEALS.

HORACE DRESSER, Appellant, vs. BENJAMIN F. BROOKS, Respondent.

The 7th rule of this court applies to appeals pending when the rule was adopted. *Held*, in such an appeal, where the respondent waited forty days after the rule took effect, no copies of the case having been served, and then entered an order under rule 7, dismissing the appeal and the proceedings were remitted, &c., that he was regular.

After a return has been filed, any order made, which finally disposes of the appeal, whether upon the merits or not, it is proper to remit the proceedings to the court below. (The case of *McFarlan v. Watson*, ante, page 128, seeming to recognize a different doctrine, is incorrectly reported in that respect.)

After a cause has been regularly remitted to the court below, this court has no jurisdiction to grant relief. The only remedy is a new appeal.

Where too much costs are charged in such a case, the remedy is by motion to the court below.

January, 4, 1850.—Appeal from a judgment of the Supreme Court, brought September 1, 1848.

The appellant did not serve printed copies of the case, and on the 14th August, 1849, the respondent entered an order dismissing the appeal for want of prosecution, with costs, pursuant to the 7th rule of the court; and the cause was remitted to the court below, where execution was issued on the judgment, with costs of the appeal, amounting to \$85.13—of which \$25 was for costs before argument, and \$50 for argument. (Code, § 307.)

H. DRESSER, *in person*, moved to set aside all the respondent's proceedings for irregularity. The 7th rule was not applicable to this case, the appeal having been taken before the present rules were adopted. (See rule 19.) *Second*. As the judgment of the court below was neither reversed, affirmed nor modified, this was not a case for a remittitur. There was no judgment of this court within the meaning of the 16th rule of the court, or within the 12th section of the code. (*McFarlan v. Watson*, 4 Howard, P. R. 128.) *Third*. Execution has been issued for too much costs.

C. H. DOOLITTLE, *for the respondent*.

BRONSON, Ch. J.—The appeal was pending when the 7th rule was adopted, and when it took effect; the respondent waited forty days after the rule took effect, and no copies of the case having been served within that time, he then proceeded, under the 7th rule, and entered an order dismissing the appeal. The first question is, whether the 7th rule ap-

plies to such a case, or whether it is governed by the former practice, (see rule 19.) A majority of the judges are of opinion that the rule applies; and consequently, that the appeal was regularly dismissed.

2. After a return has been filed, we think a remittitur is proper whenever any order is made which finally disposes of the appeal, although it may not be an order on the merits. It is a mistake to suppose the court held otherwise in *McFarlan v. Watson*. There was an appeal in that case from a judgment and an order, and the appeal was dismissed so far as related to the order only; and yet the respondent took a remittitur, and sent back the judgment as well as the order. This was clearly irregular, and for that reason the respondent's proceedings were set aside.

3. Although the respondent has been regular, the appellant would be relieved on terms, if we had power to grant it; but as the cause has been regularly remitted to the Supreme Court, we no longer have jurisdiction, and cannot grant relief. The only remedy is a new appeal.

4. Although the respondent may have charged too much costs, the remedy for that is by motion in the court below.

Motion denied. (See *Thompson v. Blanchard*, post, page 210.)

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## COURT OF APPEALS.

### WOLFE and others vs. VAN NOSTRAND.

An additional allowance pursuant to § 308 of the code, cannot be made by this court. It is confined to the court of original jurisdiction, and in reference to the trial in that court.

January 15, 1850.—WOLFE and others brought ejectment in the Superior Court of the city of New York, where judgment passed for the defendant. The plaintiff then brought a writ of error to this court, after July 1, 1848, and in September last the judgment was affirmed.

S. STEVENS, *for the defendant in error*, now moved for an additional allowance, pursuant to the 308th section of the code. He said a writ of error was a new suit, and there has been a trial in this court within the definition of a trial as given by the code. He cited sections 8, 252, 308 and 309.

W. KENT, *for plaintiff in error*.

BRONSON, Ch. J.—We think an additional allowance, beyond the costs given by the 307th section of the code, can only be made by the court of original jurisdiction, and in reference to the trial in that court.

Motion denied.

## COURT OF APPEALS.

ALEXANDER SMITH, Appellant, vs. BENJAMIN LYNES and three others.

On an appeal from a judgment, where one of several defendants, who appeared by one attorney, recovered a certain sum, and three other defendants, who appeared by a different attorney, recovered a different sum against the plaintiff, both sums included in one record: and on bringing the appeal the plaintiff gave an undertaking pursuant to § 335, covering both sums, and also one pursuant to § 334. *Held*, sufficient. Not necessary to give two undertakings pursuant to § 334, to the defendants.

*January 15, 1850.*—Smith brought replevin against Lynes and three others in the Superior Court of the city of New York: Lynes appeared by one attorney, and the three other defendants by another—the two attorneys having no connection in business. Judgment was rendered that Lynes recover \$2008.78 against the plaintiff, and that the three other defendants recover against the plaintiff \$412.93. There was but one judgment record. The plaintiff appealed to this court; and gave an undertaking pursuant to the 335th section of the code, to pay the two sums adjudged to the defendants, in case the judgment should be affirmed: and he also gave another undertaking, pursuant to the 334th section of the code, to pay all costs and damages which might be awarded against him on the appeal, not exceeding \$250.

B. W. BONNEY, *for the respondent Lynes*, moved to dismiss the appeal, on the ground that there should have been two undertakings in the sum of \$250 each; one to Lynes, and one to the other three defendants.

S. STEVENS, *for appellant*.

BRONSON, Ch. J.—There is but one judgment, though it is for two sums of money: and as the appellant has given security for both of those two sums, and a further undertaking for all costs and damages which may be awarded against him, not exceeding two hundred and fifty dollars, there has been a full compliance with the statute.

Motion denied.

VOL. IV.

## COURT OF APPEALS.

THOMPSON, Respondent, vs. BLANCHARD & WHEELER, Appellants.

An appeal is "*perfected*" within the meaning of the code, (and Rules 2d and 7th of this court which follow the code,) when the proper undertaking, with an affidavit of the sureties, has been executed, and notice of the appeal has been served on the adverse party, and on the clerk with whom the judgment or order was entered. And the twenty days under rule 2d, and the forty days under rule 7th, commence running from that time.

*January* 15, 1850.—Notice of the appeal was given to the respondent who was plaintiff in the court below, on the 2d day of November last; and on the 5th day of that month notice of the appeal was served on the clerk, and the proper undertaking was filed. On the 27th day of the same month the respondent entered an order, under the 2d rule of this court, dismissing the appeal for want of prosecution, on the ground that no return had been filed within the twenty days allowed for that purpose.

N. HILL, Jr., *for the appellants*, moved to vacate the order dismissing the appeal on several grounds; and, among others he said the order was entered too soon. The appellant has twenty days after the appeal is perfected to cause the return to be filed, and the appeal is not perfected, nor is there any stay of proceedings, until after the ten days allowed for excepting to the sureties have elapsed; and if there be an exception within ten days, then the appeal is not perfected, nor is there any stay of proceedings until the sureties have justified. If the appellant wants a stay of proceedings in the meantime, he must obtain an order for that purpose in the court below. He cited rule 2d and the following sections of the code, 340, 341, 196, 334, 332, 343, 339, 328.

S. STEVENS, *for the respondent*, cited sections 334, 335, 341, 342 of the code.

BRONSON, Ch. J.—In using the word "*perfected*," the second rule of this court follows the code; and although there is room for doubt, we think an appeal is perfected, within the meaning of the code, when the proper undertaking, with an affidavit of the sureties, has been executed, and notice of the appeal has been served on the adverse party, and on the clerk with whom the judgment or order was entered. It is true that the appeal may still fail, should there be an exception to the sufficiency of the sureties, and they should not justify, (§ 341.) But when the party has executed the undertaking and given notice, he has done all in his power to perfect the appeal; and the proceedings ought then to be stayed, with-

out requiring him to get an order for that purpose. And if the appeal is deemed perfected for the purpose of a stay, it ought also to be deemed perfect for the purpose of requiring the appellant to take the next step in the cause. The twenty days allowed by the second rule for procuring a return (and the forty days allowed by the seventh rule for serving cases,) should commence running from that time. The order dismissing the appeal was not, therefore, taken too soon.

But on the facts disclosed in the papers, which I need not repeat, we think the respondent waived the order dismissing the appeal, and was not afterwards at liberty to set it up. On this ground the motion should be granted.

There has been no return nor remittitur in this case, as there was in *Dresser v. Brooks*, (*ante*, page 207,) and vacating the order dismissing appeal will leave the parties in the same position as though the order had never been entered. Motion granted.

NOTE.—A *remittitur* cannot be made on the dismissal of an appeal under rule 2d, for the reason that no return has been filed. The omission to file the return, is the ground for dismissing the appeal.

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## COURT OF APPEALS.

### THE FARMERS' LOAN AND TRUST COMPANY, Appellants, vs. CARROLL and others, Respondents.

In all cases where the suit was commenced before the code and determined afterwards, the parties must govern themselves on appeal, as far as may be practicable, by the new machinery: but where that will not answer the purpose, the parties are at liberty to resort to the former practice, unless that course has been plainly forbidden by the Legislature.—BRONSON, Ch. J.

[See the different objections raised and considered in this case. 1st. That there can be no appeal in those cases where jurisdiction *vested* in the Supreme Court by force of the constitution. 2d. A defective or imperfect return, it being made according to the old practice. 3d. The decree should have been enrolled. 4th. The omission to print the clerk's return entire, including his certificate or verification.]

January 15, 1850.—N. HILL, Jr., *for the respondents*, moved to dismiss the appeal on several grounds, which are sufficiently stated in the opinion of the court.

W. C. NOYES, *for the appellants*.

BRONSON, Ch. J.—This is an old suit, and most of the objections which have been taken to the proceedings of the appellants, spring out of the repeated changes which have recently been made in the laws which govern



the procedure in civil actions. In addition to the old practice, which was in force when the suit was commenced, we had two new Judiciary Acts in 1847; a new code in 1848; and another in 1849. These changes, with the defects which are usually found in all new inventions, have made it very difficult for parties to find their way to the end of a law-suit: and unless a pretty large license is taken with codes, and the court rules which the codes have rendered necessary, there will sometimes be a failure of justice.

1. The suit was pending in the Court of Chancery on the first Monday of July, 1847, when by force of the constitution (Art. XIV. § 5,) jurisdiction of the suit became vested in the Supreme Court; and in September last a decree was made by that court dismissing the bill for want of equity. From that decree an appeal has been taken to this court. An appeal lies from a judgment or decree in an action "commenced" in the Supreme Court, "or brought there from another court." (Code, § 11, 333, and Supp. Code, § 2, sub. 3.) It is said that the words, "brought there from another court," can only mean such suits as are brought into the Supreme Court by appeal or writ of error; and, consequently, that there can be no appeal in those cases where jurisdiction vested in that court by force of the constitution. But it can hardly be supposed that the codifiers intended to cut off appeals in that large class of cases; and we think the eleventh section of the code may be so construed as to include them. As jurisdiction in suits which were before pending in other courts became vested in the Supreme Court on the specified day; and as the code says nothing about the manner in which the transfer was made, it will not be doing any great violence to language to consider those suits as having been "brought" into the Supreme Court from another court. We think this a case where there may be an appeal.

2. Under the last code, the return of the clerk to an appeal is to be a certified copy of the notice of appeal, and of the judgment roll (§ 328;) and our rule follows the code. (Rule 1.) This will answer the appellant's purpose when he wishes to review a judgment in a suit commenced under the code; for the judgment roll will, in most cases, contain all the materials for a review. But in equity suits commenced before the new practice was adopted, the return will contain neither the pleadings nor proofs. We must of necessity, therefore, go back to the old practice in such cases, or else deny a review to the party feeling aggrieved. The return filed in this case contains copies of the notice of appeal, and of the decree. That is all the appellants could get. Under the former practice, the pleadings and proofs constituted no part of the return. (7th Rule of

1847:) but the pleadings and proofs, with certain other papers, were to be contained in the case which was made and printed for the use of the court and counsel. (10th Rule of 1847.) The appellants have of necessity followed the old practice; and as it is not suggested that the case which they have printed and served omits any paper which ought to be before the court, or includes anything which should not be considered, we think the appeal should not be dismissed, either on the ground of a defective return or an imperfect case.

3. It is also objected that the decree appealed from has not been enrolled, and we are referred to several sections of the code, (11, 333, 281, 328,) in connection with the second section of the supplemental code. If the parties must follow the letter of the new system, this may, perhaps, be a fatal objection. But as we have already seen, this being an old suit, must of necessity be governed, in a great degree, by the former practice; and under that practice, there might be a review without an enrolment of the decree. The objection is overruled.

And here it may be proper to say that in all cases where the suit was commenced before the code and determined afterwards, the parties must govern themselves on appeal, as far as may be practicable, by the new machinery; but where that will not answer the purpose, the parties are at liberty to resort to the former practice, unless that course has been plainly forbidden by the Legislature.

4. The clerk's return entire, including his certificate or verification that the papers returned are copies of the originals, should have been printed. But as nothing has been omitted but the word "copy" and the name of the clerk, we will allow the cases to be amended. Motion denied.

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## COURT OF APPEALS.

DERICK C. LANSING and others, Complainants, vs. DAVID RUSSELL and others, Defendants.

The awarding or refusing an issue to be tried at law, and the granting or refusing a new trial, are matters resting entirely in the discretion of the chancellor. Such orders are not the subjects of appeal to an appellate court. *Quære?* Whether they are the subjects of review, when the final order upon the merits is considered.

January 15, 1850.—Bill filed in April, 1844, to set aside two deeds of real estate, on the ground that they had either been forged, or had been obtained by force or fraud. After answer and replication, the chancellor,

in April, 1845, ordered several issues to be tried at law, touching the matters of fact in dispute between the parties. A trial was had at the Dutchess circuit in November, 1845, when the jury found a verdict for the defendants on all the issues. The complainants made a case containing the evidence on the trial, and moved the chancellor for a new trial, on the ground that the verdict was against the weight of evidence. In October, 1848, the chancellor made an order, as of August 10, 1847, granting a new trial of the issues as to one of the deeds, and denying a new trial as to the other deed. From this order both parties appealed to this court, and made a case containing the pleadings, the issues, the evidence given at the circuit, and the order in question.

D. BUEL, Jr., *for the complainants*, commenced the argument, when the court suggested, that the granting or refusing a new trial in such a case was a question addressed entirely to the discretion of the chancellor, and expressed a doubt whether an appeal would lie. Mr. Buel said he had examined that question, and cited the following authorities for the purpose of showing that it was a proper case for a review: 2 Smith's Chan. Pr. 84-6; 1 Dow & Clark, 139; 5 John. Ch. 156-7; 7 Brown's Parl. Cas. 1, 208; 1 Knapp's Rep. Priv. Coun. 73; 1 Barb. Ch. Prac. 456-460; 3 Russell's R. 441; Stat. of 1839, p. 292; Rule 140, Chancery rules of 1844; 3 Paige, 457; 2 Daniel's Chan. Prac. 1289, Perkins' Ed., Harrisburg's Ed. p. 730; 1 Mylne & Keene, 253.

S. STEVENS, *for the defendants*, also argued in favor of sustaining the appeals. He cited 2 Simons' R. 42, 44.

The court said they would suspend the argument on the merits for the present, and look into the preliminary question.

On a subsequent day,

BRONSON, Ch. J., said: We have considered the preliminary question which was mentioned on the opening of the argument, and are confirmed in the first impression, that an appeal will not lie. In cases of this kind, all the books agree that the awarding or refusing an issue to be tried at law, and the granting or refusing a new trial, are matters resting entirely in the discretion of the chancellor. He may ask the aid of a jury to inform his conscience, or he may decide without such assistance. He may order a new trial although the judge who presided at the circuit is satisfied with the verdict; and he may do it for reasons which would have little or no influence in a court of law. He may refuse a new trial, although there were errors in point of law at the circuit, and even though dissatisfied with the verdict. He may decree in accordance with the verdict, or he may disregard the finding of the jury, and decree the other

way. In short, the jury and the verdict are things which the court may use or let alone as it sees good. It would seem to be quite obvious, that the order which the court makes on a motion for a new trial is not a proper matter for review in an appellate court. There are two or three cases in England where the House of Lords has reviewed such an order on appeal; but the question whether it was proper to do so was neither made nor considered. In this state it is settled, that there can be no appeal from a decision of the Court of Chancery upon a question addressed to its discretion. (*Fort v. Bard*, 1 Comst. 43; *Schermerhorn v. Mohawk Bank*, id. 125; *Spaulding v. Kingsland*, id. 426; *VanDewater v. Kelsey*, id. 533; *Marvin v. Seymour*, id. 535; *Hazleton v. Wakeman*, Nov. Tr. '48; *Sherman v. Felt*, March Tr. '49; *Sherman v. Daggett*, March Tr. '49.) In the case of *Candee v. Lord*, (May Tr. '49,) there was an appeal from an order of the chancellor directing an issue at law; and the appeal was dismissed after an argument on the merits, on the ground that awarding or refusing the issue was a matter resting in the discretion of the Court of Chancery.

The parties cannot come here until after a decree on the merits of the controversy. Whether the order in question can then be considered is a point which need not be settled at this time. Appeals dismissed.

NOTE.—The following cases referred to in the above opinion will be found reported as follows: *Hazleton v. Wakeman*, 2 Howard's Pr. R. 357; *Sherman v. Felt*, id. 425; *Sherman v. Daggett*, id. 426.

## COURT OF APPEALS.

HENRY D. CRUGER, Respondent, vs. DOUGLASS and others,  
Appellants.

A decree which directs a reference, for the purpose of taking and stating an account between the parties and for other purposes, and reserves further directions until the coming in and confirmation of the report; and then, "that such further order or decree may be made thereon as shall be just," is not a final decree, that can be appealed from to this court, although it may be final in many particulars. (See *Harris v. Clark*, *ante*, p. 78, where the same point was decided.)

January 23, 1850.—H. D. CRUGER, *in person*, moved to dismiss the appeal, on the ground that the decree appealed from was not final. The suit was pending in the Court of Chancery before either of the codes were passed, and the decree or order appealed from was made by the Supreme

Court in November, 1848. The other facts are sufficiently stated in the opinion of the court. (He cited *Harris v. Clark*, 4 Howard's P. R. 78.)

C. O'CONNOR, *for appellants*, cited 9 Paige, 638; 6 Howard, 203.

BRONSON, Ch. J.—The decree appealed from settles all the leading points in controversy between the parties, but it directs a reference for the purpose of ascertaining what real and personal estate falls within the operation of the decree; and directs the referee to take and state an account between the parties. On the coming in and confirmation of the report, the amount found due to either party is to be paid by the other, "at such time or times as shall be specified in said report;" and the sum of five thousand dollars is to be forthwith paid to the respondent, on account of the moneys which may be payable to him under the order or decree. The referee is to make his report with all convenient speed, "to the end that on the coming in and confirmation of his report, such further order and decree may be made thereon as shall be just." It is also ordered, that neither party shall have costs as against the other; "and that all further directions be reserved until the coming in of the said referee's report." Although the decree is final as to several particulars, it evidently is not so as to all. "Further directions" are reserved until the coming in of the report; and then "such further order and decree may be made thereon as shall be just." It will be necessary to set the cause down for a further decree on the coming in of the report. The decree already made is not final; and the appeal was premature. The point was decided in *Harris v. Clark*, at the last July term. Motion granted.

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## SUPREME COURT.

E. T. GRANT and al. vs. JOHN McCAUGHIN and al.

Where a defendant is allowed to answer on payment of costs, the court will not impose the further condition, that the defendant shall not set up the defence of usury.

*Albany Special Term, January, 1850.*—In this case Mr. C. L. AUSTIN moved to set aside a judgment and showed that the defendant had a good defence on the merits and that judgment had been entered in consequence of a misapprehension as to the effect of a stipulation that had been given to him extending the time to answer.

Mr. W. L. LARNED, resisted the motion, and showed that an execution had been issued, and that the answer tendered to him only set up the de-

fence of usury; and claimed that if the defendants were let in to answer on terms, it should be on the condition that they should not seek to avail themselves of the defence of usury.

PARKER, Justice, allowed the defendant to answer, on paying to the plaintiff \$3.50, (being one-half the sum allowed by the code for the services of his attorney in prosecuting the action to judgment,) together with the disbursements included in the judgment and incurred on the execution, and also \$10 for his costs of resisting the motion.

But he refused to impose any condition as to the nature of the defence. He said so long as the statute made the taking of usury a defence, it was entitled to be treated like every other legal defence, and he would make no discrimination in imposing terms. One of the defendants being insolvent, the judgment was directed to stand as security.

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### SUPREME COURT.

DAVID L. SNYDER vs. JOHN YOUNG, Ex'r, &c. of Benjamin Young, deceased.

A creditor suing an executor is not entitled to recover costs on the ground that the latter did not advertise for the presentation of claims.

A plaintiff is in no case entitled to recover costs against an executor unless there has been a refusal to refer, the claim being disputed; or an unreasonable resistance or neglect of payment, the demand having been presented.

Where costs were improperly, and without leave of the court, included in the entry of judgment, they were ordered to be stricken out on motion.

*Albany Special Term, January, 1850.*—In this action the plaintiff recovered \$350 damages. On the 15th January inst., while the defendant's attorney was absent from home, the plaintiff left at his office a copy of his bill of costs, with a notice of taxation before the clerk on the 17th inst. Defendant's attorney did not return until after the taxation. The costs, as taxed by the clerk, and entered in the judgment, included \$39 for the service of the plaintiff's attorney, which defendant's attorney now moves to strike out, relying on the case of *Newton v. Sweet, ex'r*, 4 How. Pr. R. 184.

J. H. RAMSAY, *for defendant.*

T. SMITH, *for plaintiff.*

PARKER, Justice.—The affidavits show that the executor neglected to advertise for the presentation of claims, as required by statute; and the plaintiff's counsel contends that the plaintiff is therefore entitled to recover costs, as was decided at special term, in *Harvey v. Skillman's executors*, 22 Wend. 571. But I think we are bound to follow the decision made in *Bullock v. Bogardus's executor*, 1 Denio, 276. The latter was decided at the general term, and overrules the previous case of *Harvey v. Skillman*, and is, I think, recognized by the still later case of *Bradley v. Burwell*, 3 Denio, 261. Notwithstanding the doubts expressed of the correctness of the decision in *Bullock v. Bogardus*, (Dayton's Surrogate, 123,) I think we must now consider it settled, that the omission of the executor to publish the notice does not entitle a creditor to costs, and that a plaintiff can in no case recover costs, unless there has been a refusal to refer, the claim being disputed; or an unreasonable resistance or neglect of payment, the demand having been presented. Here was no unreasonable resistance, for the plaintiff recovered much less than he claimed; and there was no refusal to refer, for no offer was made by the creditor.

Before the adoption of the code, the plaintiff could not have recovered either costs or disbursements in this case; nor would he have been permitted to enter up judgment for costs except by leave of the court. (*Winne v. Van Schaick*, 9 Wend. 448.) It has been held, however, in *Taylor v. Gardner*, 4 How. Pr. R. 67, that under the code, the word "costs" means only the compensation of the attorney; and in *Newton v. Sweet*, id. 184, that "disbursements" are recoverable in all cases against executors, as in other actions. The moving party here does not question the correctness of these decisions, but asks only to strike out the compensation of the attorney. So much he is certainly entitled to.

The motion must be granted, but the notice of taxation being regularly served, and the defendant's attorney not having appeared to object before the clerk, no costs of motion are allowed.

## SUPREME COURT.

AMI BREWSTER vs. GILBERT CROPSEY, Sheriff of the county of Rensselaer, IRA ALLEN and THOMAS W. JONES.

CHARLES M. DAVIS vs. THE SAME DEFENDANTS.

A mortgagee, who is junior in lien to a judgment creditor (of the mortgagor) upon whose execution the mortgaged premises are sold, is entitled to the surplus moneys to the amount of his mortgage, although junior judgment creditors to the mortgagee may have had executions in the sheriff's hands prior to, and at the time of the sale, and the premises were purchased at the sale by the mortgagee. The statute relating to the redemption of lands sold upon execution, does not apply to such a case.

A different rule might prevail as to the mortgagee, if the sale was made upon all the executions in the sheriff's hands—junior, as well as senior, to the mortgage.

*Rensselaer Circuit, Dec. 1849.*—Demurrer to the answer of the defendants, Allen and Jones, in each of these suits. The complaint in the first action states, that on the 27th of June, 1848, William P. Van Rensselaer recovered a judgment against the defendant Jones, for \$366.67, upon which an execution was issued to the defendant Cropsey, sheriff of Rensselaer, on the 4th day of August, 1848—that on the 19th of January, 1849, the plaintiff in that action recovered a judgment against Jones for \$114.27, and on the same day an execution was issued thereon, to the same sheriff—that prior to the issuing of the latter execution the former execution had been levied upon a farm in the town of Berlin, in said county, of which the defendant in the execution was seized—that having given due and legal notice, that he should sell the farm by virtue of an execution, the sheriff on the 21st day of June, 1849, sold the farm to the defendant Allen, who became the purchaser, for the sum of \$2740—that Allen paid to the sheriff \$425.81 of the purchase-money, being the amount required to satisfy the Van Rensselaer execution and sheriff's fees, and refuses to pay the balance, and the sheriff refuses to institute any proceedings to compel him to do so, and that Jones also assents to, and approves of such refusal; all of them pretending that Allen has lien or incumbrance on the farm, to which he has a right to apply the residue of his bid. The plaintiff demands judgment against the defendants for the amount of his execution against Jones, with interest.

The defendants, Allen and Jones, in their answer state, that on the first day of September, 1848, Jones executed to Allen, his bond in the penalty of \$4400, conditioned for the payment of \$2200 on the first day of September, 1850, with interest semi-annually, and to secure the payment,



he at the same time executed and delivered to Allen a mortgage upon the farm mentioned in the complaint, which mortgage was duly recorded, and became a lien upon the farm, prior to the lien of the plaintiff's judgment—that the sheriff sold the farm, as stated in the complaint, by virtue of the Van Rensselaer execution and no other—and that after paying that execution and the legal costs and expenses of the sale, the balance of the purchase-money was, with the consent of Jones and the sheriff, applied by Allen to the payment and satisfaction of his bond and mortgage, and after such payment and satisfaction, there remained no surplus.

The complaint and answer in the second action, were in all respects similar to the first, except that the plaintiff's judgment was recovered on the 21st of April, 1849, for \$255, and his execution was issued on the 22d of May, in the same year.

To the answer in each action the plaintiff demurred, upon the ground that it does not allege facts which authorize the application of the moneys arising from the sale to the payment of Allen's mortgage and also upon the ground that it does not sufficiently allege an indebtedness of Jones to Allen for the security of which the bond and mortgage were executed.

J. HOLMES, *for plaintiff.*

H. P. HUNT, *for defendants.*

HARRIS, Justice.—The plaintiff's judgments were liens only upon the equity of redemption of Jones in the farm. Upon its sale they could only claim payment out of the surplus which should remain after satisfying the mortgage. If the sale had been made under all the judgments, there might have been more difficulty in protecting the lien of the mortgage, but even then, I think, the mortgagee might have insisted upon having his mortgage satisfied in its order of priority. The sale, however, was under the Van Rensselaer judgment alone. Though when he made the sale, the sheriff had received the plaintiff's executions, he could only sell by virtue of that upon which he had advertised to sell. (*Mascraft v. Van Antwerp*, 8 Cowen, 834.) The only advantage which the plaintiffs could derive from having their executions in the hands of the sheriff at the time of the sale, was that he might apply any overplus moneys arising from the sale, to which the defendant in the execution might be equitably entitled, to their payment. But the defendant in the executions had no equitable right to the overplus moneys arising from the sale. As against him, his mortgagee was entitled to receive them, and to the extent of his mortgage the plaintiff had no right at all to them. If the purchase had been made by a third person, I see no reason why the court should not protect the equitable

rights of the mortgagee in the surplus, by directing its application to the payment of the mortgage. The right of the court thus to interfere was asserted in *Williams v. Rogers*, (5 John. 163.) See also *Every v. Edgerton*, (7 Wend. 259.) These were cases in which the surplus moneys were claimed by an intermediate grantee. But I can see no difference, in principle, between the rights of a grantee and those of a mortgagee in such cases. The question is, who is equitably entitled to the surplus moneys. In the one case, the grantee, by virtue of his conveyance has an absolute right to the whole surplus, whatever the amount. In the other, the mortgagee has an equal right to the surplus to the extent of his lien.

The cases upon which the plaintiff's counsel relies, relate to the operation of the statutes allowing a redemption of lands sold upon execution. That statute has no effect upon the question under consideration. The rights of the parties here are the same as they would have been if no redemption act had been passed. In *Van Rensselaer v. Sheriff of Albany*, (1 Cowen, 501,) an attempt was made by a mortgagee, whose lien was junior to that of the judgment upon which the mortgaged premises had been sold, to redeem from the purchaser at the sheriff's sale. It was held that mortgagees were not embraced within the provisions of the act. It had been argued in that case, that if the statute should be so construed as to allow a judgment creditor, and not a mortgagee, to redeem, its effect would be to invert the order of liens so as to give a junior judgment creditor a preference over a senior mortgagee. In answer to this argument, Chief Justice Savage referred to the principle to which I have alluded, and said that if the statute had the effect to invert the order of liens it must be through the negligence of the creditor. If a junior creditor, meaning, undoubtedly, a mortgagee, would secure himself upon a sale under a senior judgment, he must bid the amount of the older execution and his own lien. The same thing is more definitely expressed by Talcott, *arguendo*. "The mortgagee," he says, "should have bid to the value of land. He would then, after paying the judgment, have held the surplus money to pay his mortgage." Not, as I understand it, that it is necessary that the mortgagee should bid off the land—but that he should see that it is not bid off for less than its value, or the amount required for the satisfaction of his lien. Whether he becomes a purchaser, or a third person, he is entitled to have the overplus money, after paying the execution upon which the sale is made, applied to the satisfaction of his lien. Thus, the redemption act, while it furnished a new remedy to junior judgment creditors, left the junior mortgagee to protect his lien in the same manner as before.

The question in *Silliman v. Wing*, (7 Hill, 159,) also depended, exclusively, upon the statute. Lands had been sold under three judgments for an amount sufficient to satisfy them all. Fake, who had a judgment which was a lien, junior to one, and senior to the other two, of the judgments, upon which the land was sold, sought to redeem by paying the amount of the prior judgment. It was held that he could only redeem in the manner prescribed by the statute: that is, by paying "the sum of money which was paid on the sale." What would have been the result, if, at the time of the sale, Fake had sought to have the moneys arising from the sale, after paying the prior judgment, applied to his judgment in preference to the two junior judgments, it is not necessary to inquire.

I think, too, that the existence of the bond and mortgage and the indebtedness of Jones to the mortgagee are sufficiently alleged in the answer. My opinion, therefore, is that, upon the issue of law made by the demurrer, judgment should be rendered for the defendants in each action, but with liberty to the plaintiff to reply to the answer of the defendants within ten days after notice of this decision upon the payment of the costs subsequent to the demurrer.

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#### COURT OF APPEALS.

*(Decisions of the Court of Appeals, November Term, 1487, continued and concluded from page 184, ante.)*

WILLIAM WAMBAUGH, appellant, vs. ARCHIBALD H. GATES and wife, and others, respondents.—*Decree affirmed.* Z. A. LELAND, for appellant, JOHN A. COLLIER, for respondents. This was a bill filed in the late Court of Chancery by Wambaugh, against the defendants as heirs, devisee and surviving executor of Jonathan Boyer, deceased; and sought to satisfy the amount of a judgment he had obtained against the executors of Boyer, out of real estate which was chargeable by the will of Boyer with certain legacies, and which real estate had been transferred by the devisee previous to the recovery of the judgment.

The principal point in the case, decided by the chancellor, was, that the complainant was bound, under the pleadings and proofs exhibited in the case, to proceed against the surviving executor personally, for the satisfaction of his debt, before he could resort to the interests of the legatees in the real estate upon which their legacies were a lien, if under the circumstances that interest could be reached in any way—the property having been conveyed by the devisee previous to obtaining the judgment.

A decree was made in favor of the complainant against the surviving executor personally, and a reference ordered. There was a question in relation to the proper parties to the suit. (Reported, 11 Paige, 505.)

FREDERICK H. STIEF, plaintiff in error, vs. MONMOUTH B. HART, defendant in error. (Judgment affirmed.) A. TABER, for plaintiff in error, S. STEVENS, for defendant in error. The principal point decided in this case, was, that property pledged, might be taken out of the possession of the pledgee by a sheriff, on an execution against the pledgor, and the pledgor's interest therein sold. (Reported, 1 Comstock, 20.)

CASPARUS C. HOES and wife and others, appellants, v. JOHN M. VAN HOESEN, respondent. (Decree affirmed.) H. HOGBOOM, for appellants, A. L. JORDAN, for respondent. In this case it was decided that the reversionary interest in the *personal estate* was the primary fund for the payment of the legacies which were made chargeable by the testator's will upon the devisees of the reversionary interest in the real estate. The reversionary interest in the personal estate not having been disposed of by the will. (Reported, 1 Comstock, 120.)

JOHN H. HOWLAND vs. WILLIAM AYRES and others. (Decree affirmed.) R. MANNING, for appellant C. GREEN, E. H. SEELY, for respondents. This was an appeal by C. Green from an order of the chancellor affirming an order made by the Assistant Vice-Chancellor of the 1st circuit, upon exceptions to a master's report, as to the right of C. Green to certain surplus moneys, arising from a sale of mortgaged premises under a decree.

The only question was, whether a power of attorney executed by C. Green to his brother W. C. Green, authorized the latter to make and execute an assignment of the judgment upon which the surplus moneys were directed to be applied. The power was not one to do a specific act, and concluding with general words, which general words are usually restricted to the specific object of the power. But it was a general power in the most extended sense of the term; and held sufficient for the purposes of the assignment. (Not reported.)

THE EAGLE FIRE COMPANY of New York vs. EDWARD FLANAGAN and others. (Decree affirmed.) A. L. ROBERTSON, for appellant JOHN BLAKE; J. W. GERARD, for respondent WILLIAM DUFF. This was an appeal by John Blake from an order of the chancellor affirming an order of the Vice-Chancellor of the 1st circuit, allowing an exception to the master's report. The master reported that the judgment in favor of William Duff was the next oldest lien upon the surplus moneys in point of time, but that in consequence of usury between the parties upon the loans and transactions for which the judgment was given as

security, the claim was void. And allowed Blake's claim in preference to Duff's, on that ground. Duff excepted, which was sustained by the Vice-Chancellor and Chancellor. The question was one of fact, in reference to the usury sought to be established before the master upon Duff's judgment. No written opinion was delivered by the Vice-Chancellor or Chancellor. (Not reported.)

DAVID RUSSELL LEE, plaintiff in error, vs. JAMES GORDON BENNETT, defendant in error. (Judgment affirmed.) JOHN GRAHAM, for plaintiff in error, EDWARD SANDFORD, for defendant in error. Lee sued Bennett before an assistant justice of the city of New York, to recover for alleged services rendered by the plaintiff as a reporter for a newspaper. The justice, upon the evidence, rendered judgment for the defendant. The Superior Court of New York, upon *certiorari*, reversed the judgment of the justice. Upon writ of error, the Supreme Court reversed the judgment of the Superior Court, and affirmed that of the justice. This court affirmed the judgment of the Supreme Court.

It seems that the plaintiff sought to raise an implied assumpsit from proof of services rendered, which came to the use of the defendant, and the principal point was, whether the justice properly excluded the opinion of a witness (Doyle) offered by the plaintiff to prove these facts. The question rejected was this: "From that printed copy can you state whose reports they were?" It was held in the Supreme Court, that the rule which requires witnesses to testify to facts from knowledge and not from belief, justified the exclusion of the testimony. It was not a question of skill and judgment, where witnesses of science and experience are allowed to give their opinion.

MICHAEL CAFFEE, plaintiff in error, vs. ANTON BERTRAND, defendant in error. (Judgment affirmed.) FRANCIS B. CUTTING, for plaintiff in error, A. TABER, for defendant in error. Action of trover—question as to the effect of a judgment of a foreign criminal court, and of the value of the property. (Not reported.)

SETH B. ROBERTS, appellant, vs. DAVID S. JONES and another, executors, &c. respondents. (Decree affirmed.) D. DUDLEY FIELD, for appellant, D. S. JONES, for respondents. Exceptions for impertinence: allowed on the ground of the prolixity of the matter excepted to, even if it could be inquired into on the merits. (Not reported.)

MEDAD PLATT, plaintiff in error, vs. JONATHAN D. CATHELL, defendant in error. (Judgment affirmed.) A. BRADLEY, for plaintiff in error, DANIEL LORD, for defendant in error. This was a case involving the question of the liability of an agent executing, under seal, a *charter party*, in his own name, "agent," added. (Reported, 2 Denio, 604.)

## SUPREME COURT.

CORNELIUS C. KROM vs. HENRY HOGAN and others.

A defendant cannot defend himself against an application for an attachment, for doing an act in disobedience of an injunction, on the ground that he acted by the authority and direction and for the benefit of a third person, who, he alleges, has become entitled, since the service of the injunction, to do the act complained of.

It is a sufficient answer to a motion to vacate an injunction, that the defendant is in contempt for disobeying it.

Where the defendant moves to vacate an injunction on an answer, verified as required by the *amended* code, it will be considered as made upon affidavit; and the plaintiff will be entitled to oppose the same by affidavits or other proofs, in addition to those on which the injunction was granted.

*Albany Special Term, February, 1850.*—In this case an injunction was allowed on the complaint without notice, and served on the defendants in August last, by which they were commanded to desist from cutting or removing any timber or wood from the premises therein described. The plaintiff moved for an attachment against one of the defendants for disobeying the injunction—and the defendants moved to vacate the injunction. The facts sufficiently appear in the opinion of the court.

M. SCHOONMAKER, *for plaintiff.*

E. COOKE, *for defendants.*

PARKER, Justice.—It is satisfactorily established by affidavits that the defendant, Henry Hogan, has been several times engaged in cutting and carrying away timber from the premises in controversy, since the service of the injunction. He seeks to protect himself against punishment, by showing that he acted under the authority, by the direction, and for the benefit of Cornelius Hogan, a third person, who is not a party to this suit, and who, he says, has become the owner of the premises by purchase, since the service of the injunction. These facts afford him no protection. So long as the order of the court is in force, he is bound to obey it. It is not for him to say when the injunction shall cease to operate. If there are any facts entitling him to a dissolution of the injunction, he may apply to the court for relief; but until the court vacates the order, no direction from a third person can authorize him to violate its commands. The motion for an attachment must, therefore, be granted.

The defendant also moves, on the answer and complaint, to vacate the order for injunction. It is a sufficient answer to this application that the defendant is in contempt for disobeying its commands. Until the con-

tempt is purged, he is entitled to no favor. (2 Barb. Ch. Pr. 281; 1 Paige R. 646; 1 Clarke, 22.)

But upon the merits, I think this motion should not be granted. The facts shown by the affidavit to resist the application for an attachment, are not before the court on this motion. The defendant moves only on the facts stated in his answer. As between the complaint and the answer, if the whole equity of the complaint were denied by the answer, the court would dissolve the injunction. But the plaintiff produces an affidavit of a third person in corroboration of his complaint, and in opposition to the facts set up in the answer.

Under the code as it originally passed, neither a complaint nor an answer could have the force or effect of an affidavit. They were merely pleadings. The verification required was too loose to allow them to be used as affidavits on an application for an injunction, or a motion to dissolve it. (8 How. Pr. Rep. 327.) But the form of the jurat is now so altered by the amended code, as to change the practice in this respect. The party now swears to the facts stated in the complaint or in the answer, as positively and substantially, and in the same form as he formerly did under the chancery practice. Where an application is made to vacate an injunction on an answer thus verified, the plaintiff is at liberty to oppose the same by affidavits or other proofs, in addition to those on which the injunction was granted. (Amended Code, § 226.)

The motion to vacate the injunction is therefore denied, with \$10 costs.

## SUPREME COURT.

### ELIAS DURKEE and others vs. THE SARATOGA AND WASHINGTON RAIL ROAD COMPANY.

The objection that the complaint does not contain facts sufficient to constitute a cause of action, may be raised by a demurrer which merely specifies the ground of objection, in the language of the statute. (See *Glenny v. Hitchins*, ante, p. 98, which seems to hold adversely on this point.)

Separate causes of action, all arising out of the same class, may be united in the same complaint, provided they are *separately stated*.

By the separate stating of the several causes of action, in the complaint, it is intended that there shall be a count for each cause of action, or what is equivalent thereto.

*Washington Special Term, Dec. 1849.*—This is a demurrer to a complaint. The complaint alleges that at and before the committing of the

grievances in the complaint mentioned, the plaintiff was seized and possessed, in fee, of a certain lot and a store thereon, in the village of Fort Edward, in the county of Washington, in which store they carried on the general business of country merchants—that the defendants were, at the same time, possessed of certain lands near to and adjoining the said store and lot of the plaintiffs, for the use and occupation of the Saratoga and Washington rail road, and while so possessed, wrongfully and injuriously made, built and erected on the lands so possessed by the defendants, and on the south line of the lot so possessed by the plaintiffs, and near and upon said lot, and near said store, and upon and across a certain public highway, known as the Waterford and Whitehall turnpike, passing in front of said store and lot of said plaintiffs, an embankment for the track of said rail road of the elevation of nine feet, and the said embankment so erected, have wrongfully and injuriously hitherto kept up, by means of which the plaintiffs have been, during the whole time, greatly disturbed, injured and prejudiced in the possession, use and enjoyment of their said lot and store, and hindered and prevented from enjoying the same, in so ample and beneficial a manner as they otherwise might, could, would, or ought to have done, and also much injured in their business as merchants, and likely to lose great profits therein, for that by the means of the said premises, the means of approach to the said store and lot, and the situation and value thereof, have been greatly injured, and whereby the plaintiffs were compelled to raise and elevate their store, and put to great charges and costs about the same, and in grading the approaches to the same; and in raising the store, it was greatly damaged, and the plaintiffs claim \$1500 damages.

The complaint was sworn to, 8d May, 1849.

The defendants have demurred to the complaint for the following grounds:

1. That several causes of action have been improperly united therein.
2. That the complaint does not state facts sufficient to constitute a cause of action.

W. L. F. WARREN, *in support of the demurrer.*

WAIT & PERRY, *for the plaintiffs.*

WILLARD, Justice.—The plaintiffs have united in the same complaint three substantive grounds of injury, viz.: one for the building an embankment on the defendants' own land, one for building an embankment on the highway near the plaintiffs' store, and a third for erecting an embankment on the plaintiffs' land. These injuries are not separately stated but blended together, and the defendants have demurred for that cause.



By section 142 of the code, the complaint is required to contain a statement of the facts constituting a cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended. The 167th section provides for uniting, in the same complaint, several causes, where they all arise out of the same class; and of these classes, seven are specified; but the causes of action so united, must all belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, *and must be separately stated*. The commissioners, doubtless, had their eye upon actions at law when they framed the 167th section. They have not limited, and probably did not intend to limit the number of civil actions, as they are defined in sections 2, 4 and 5 to 7. There are other remedies, well known to our jurisprudence for ages, and which still exist, that cannot be comprised in either of the seven specified in section 167. The action for a divorce or limited separation, *a mensa et thoro*, for example, could not be united with an action upon a promissory note. All that is settled by section 167 is, that in the seven cases there specified, several causes of action may be united in the same complaint, if the rules prescribed for that purpose in that section be observed.

Among these rules for the joinder of actions are the following, viz.: "that the causes so united must all belong to one only of these classes," &c., "*and must be separately stated*." The causes united in this complaint all belong to one class, to wit, number three, but they are not separately stated. This is made a distinct cause of demurrer, by § 144, sub. 5, of the Code of Procedure.

The 150th and 151st sections throw some light on this question. By those sections, the defendant is allowed to set forth by answer as many defences as he shall have. They must be separately stated, and refer to the causes of action which they are intended to answer. The defendant is allowed to demur to one or more of the several causes of action stated in the complaint, and answer the residue. From these provisions, in connection with the foregoing, it is obvious that the code intended that each cause of action should be embraced in a single count in the complaint, and that there should be as many counts as there are causes of action. Had the old phraseology, with which the profession was familiar, been retained, fewer mistakes would have been made in this respect. The requirement, that the several causes of action must be separately stated in the complaint, is precisely equivalent to the requirement of a distinct count in a declaration for each cause of action. Without such separation, the defendant cannot have the benefit of a separate answer or demurrer.

Nor can there ever be such an issue framed, as to enable the court and jury to try it in an intelligible manner. Under the former system of pleading, the uniting of several causes of action in the same count, was a ground of demurrer. (See 1 Chitty Pl. 200, *et seq.*, 390 to 398; Gould's Pl. ch. 4, §§ 2, 3, 4, &c.; and see 10 Wend. 324.) Each count was required, singly to contain a good cause of action, and unless it did so, it was defective, (*id.*) Formely the causes of action stated in this complaint could not be joined in the same declaration, even in separate counts. (See Chitty Pl. and Gould Pl. *supra*.) By section 167 of the code, they may be united in the same complaint, if separately stated; that is, according to the ancient mode of expression, if each separate cause of action is confined to a single count.

The plaintiff's counsel denies that there is more than one cause of action set up in the complaint. They insist that the allegation that the defendants built the embankment on their own land, on the highway or turnpike, and on the plaintiff's land, is merely descriptive of its locality, and that the gravamen of the action is the consequential injury. If this were so, there would be a good ground of demurrer before the code for a misjoinder, because the statute, (2 R. S. 553, § 16,) allowing case to be brought instead of trespass, does not apply to injuries to the freehold. (See 10 Wend. 324.) For those, the remedy was left as at common law. If, then, here is a misjoinder at common law, it is because trespass and case were united in the same declaration, contrary to well-settled practice. (1 Ch. Pl. 197; 2 Saund. 117, *c. e.*) If trespass and case could not be united in the same declaration, before the code, though in different counts, they cannot be united in the same action now, unless they are *separately stated*, that is, set forth in different counts.

If the complaint had conceded that the embankment was *rightfully* built, and had claimed damages only for the unskilful or improper manner of its construction, the jury would not be warranted in giving damages for the entry on the plaintiff's lot. But the complaint states that it was *wrongfully* built, as well on the plaintiff's as on the defendants' lot. Thus it opens the case for proof of damages for the unlawful entry on the plaintiff's land, as well as for the consequential injury resulting from its erection on the defendants' own land and on the turnpike.

The second ground of demurrer is that the complaint does not contain facts enough to constitute a cause of action. We are here met, in the threshold, with the objection that the demurrer does not *distinctly specify* the grounds of objection to the complaint, as required by § 145. There is an intimation by SILL, J., in *Glenney v. Hitchins*, 4 How. Pr.

R. 98, that a demurrer in this form, without specifying wherein the complaint fails to set forth a cause of action, is insufficient; but the point was not necessary to be decided in that case, and the demurrer was in fact overruled upon the merits. But in *De Witt agt. Swift et al.*, 8 How. Pr. R. 281, the question arose, before GRIDLEY, J., on motion to set aside a judgment, which a plaintiff had entered in disregard of a demurrer, setting forth, as required by § 144, sub. 6, that "the complaint does not state facts sufficient to constitute a cause of action." The plaintiff insisted that he had a right to disregard the demurrer on account of its generality; and that the demurrer was a nullity because it did not distinctly specify wherein the complaint failed to set forth a cause of action. But the learned judge set aside the judgment as irregular, thus holding that a demurrer assigning as the ground of it, the reason stated in the 6th subdivision could not be treated as a nullity. There is nothing in the code which requires the party demurring to specify the ground of his demurrer, more distinctly than to indicate to which of the six classes it belongs. That is all that can be necessary for the information of the adverse party, with respect to the first and sixth grounds of demurrer, neither of which are waived by answering over without objection. It would lead to great prolixity, in many cases, if the reasons for saying that the complaint does not state facts sufficient to constitute a cause of action, were required to be set forth—a demurrer would assume the form of a brief for counsel rather than a pleading, under such construction of the section. I am satisfied that the objection that the complaint does not state facts sufficient to constitute a cause of action may be raised by a demurrer which merely specifies that ground of objection, in the language of the statute.

The objection to the complaint is that it does not appear how an embankment on the turnpike road can injure the plaintiffs. It is not shown that the turnpike road was the necessary way to the plaintiffs' lot and store. It is stated, indeed, that the turnpike road is in *front* of the store, but whether a hundred rods in front or immediately adjacent, is not shown. Nor is it shown how the erection of an embankment on the defendants' own land, can be unlawful; or how it can injure the plaintiffs' business. The complaint takes for granted that the defendants are a corporation, and that they have a rail road, and the court is bound to take notice of the act of incorporation. The act, § 13, (L. of 1834, p. 442,) authorizes the defendants to cross any public highway, they restoring it in a sufficient manner not to impair its usefulness. The act thus legalizes the crossing the highway so far as the public is concerned, but does not exempt the defendant from the consequential injury resulting to others. But that

injury must be so alleged that the court can see that it resulted from the act of the defendants. (See *Fletcher v. The A. & S. Rail Road*, 25 Wend. 462.) In the case cited, the embankment was stated to have obstructed the passage of the plaintiff from his lot to the street, to which it was adjoining, and that it turned the water into his cellar, so as to injure and impair his cellar-wall and basement, and greatly depreciate the value of his premises. Here the court could not fail to see that the plaintiff sustained a particular injury from the erection of the defendants. But in the present case, there is no such obvious connection between the building of the embankment on the highway and the injury to the plaintiff's business as merchants. It is not stated that their store adjoined the turnpike, or that the passage over the turnpike was necessary to approach the store. If they mean that their mercantile business was injured, in consequence of the increased facilities afforded by the railroad to reach a better and a larger market, the loss which they sustain is one for which the law affords no redress. It is *damnum absque injuria*. It is merely the common loss which some portions of the country temporarily sustain by the construction of rail roads and canals. The opening of commercial facilities to one part of the country, not unfrequently affect injuriously, the business of other places. But it has never been supposed that an action could be sustained for an injury of that character.

The defendants are entitled to judgment on the demurrer for the reasons before stated, with leave for the plaintiffs to amend their complaint; as the defect in this case arose out of a misapplication of the principles of the code to the former mode of pleading, and as the plaintiffs may have been prevented from amending when the demurrer was served, in consequence of the dictum in *Glenny v. Hitchins*, *supra*, that the demurrer was void for its generality, I shall allow the plaintiffs to amend without costs.

Judgment for the defendants on the demurrer to the complaint, with leave to amend without costs.

## SUPREME COURT.

EMILY COTT vs. JOSHUA COTT.

A wife cannot sue her husband *without a next friend*, except, in the single case of a suit for an absolute divorce. This was the equity rule of practice in such cases, previous to the adoption of the code; and *held*, that it must be the same under the present code.

*New York Special Term, October, 1849.*—This was a suit brought by the wife against her husband to recover possession of a house and lot in the city of New York, claimed to be the separate property of the wife by deed from her husband. When the cause was called in its order on the calendar, the defendant obtained judgment dismissing the complaint.

Motion was now made to set aside that judgment on the allegation that the plaintiff had a meritorious cause of action.

To which it was objected that the plaintiff could not sustain a suit in her own name, and that no valid and effectual judgment could be rendered for her in the suit.

EDMONDS, Justice.—Formerly at law, the wife could not sue her husband, because during coverture her legal existence was suspended. In equity, however, she could; but according to the course and practice of the court only, by the instrumentality of a next friend or guardian. Our statute, however, made an exception where she filed her bill for a divorce. In such a case, she was allowed to sue in her own name.

The code has now, however, permitted her to sue without joining her husband, in all actions which concern her separate property, or which are between herself and her husband. In other words, the rule in equity which recognized her separate legal existence, has now been made applicable to the foregoing cases, whether in law or equity. This suit is one of those cases, for it concerns what she claims to be her separate property. She may, therefore, sue alone; that is, without joining her husband; but it does not by any means follow, that she may sue without having a next friend to be responsible for the costs of her "false clamor."

There is a marked difference between the language used in the code in this respect and that used in the Revised Statutes, in respect to her suits for a divorce. Under the former "she may sue alone," that is, without joining with her husband. Under the latter she may sue "in her own name, that is, without a next friend."

Under the Revised Statutes it was properly held that she need not have a next friend, to be responsible for costs, and their language could not

possibly be construed to apply to a capacity to sue without joining her husband as a party. The Legislature evidently intended to increase her protection by giving her a right freely to resort to a court to obtain redress against her husband's infidelity, without the embarrassment of giving security for costs, and especially in a suit where she might compel the defendant to contribute towards those very costs, even before her case was proved or tried.

I cannot, therefore, acknowledge the force of the argument sought to be drawn from the practice under this provision of the Revised Statutes and hold that she may sue without a next friend, because she is authorized to sue without joining her husband as a party with her.

On the other hand, I am of opinion, that the whole of the equity rule ought to be applied, for the reasons of the rule are peculiarly applicable.

By that rule a next friend was required because the married woman was so situated that she could not have the protection of her husband, and must, therefore, resort to that of some other person. Such next friend need not, however, be a relation. He might be a stranger, but he must be a person of substance enough to be answerable for the costs. He is of her own selection and no one can bring a suit for her as her next friend without her consent, and the rule, while it thus aims at her protection, also has in view the protection of others against her unfounded proceedings. Hence, when the next friend of a married woman has become insolvent, the suit has been stayed until a new one was selected or security was given for the costs. So, when the next friend absconded or died. (*Pennington v. Alvin*, 1 S. & S. 284; *Drinan v. Manrix*, 3 Dr. & W. 154; *Greenaway v. Rotheram*, 9 Sim. 88; *Barlee v. Barlee*, 1 S. & S. 100.)

This question was well considered in our Court for the Correction of Errors, in *Wood v. Wood*, (8 Wend. 357.) The chancellor in that case, (which was a bill filed for separation because of ill usage) had reversed an order of a vice chancellor granting alimony, because the wife had sued in her own name without a next friend. And while the chief justice and other members of that court differed on the question whether she might not in such case as well as in a suit for an absolute divorce, sue in her own name, they all agreed that in all other cases, she could not sue except by her next friend, who must be a responsible person in order to protect others against her improper prosecutions and to interpose a salutary check upon them.

This was the law of this state when the code was enacted, and it would be quite unaccountable that the Legislature, while it increased the wife's

protection, should overlook the salutary checks then existing and well established against an abuse of the enlarged privilege conferred upon her.

This case of *Wood v. Wood*, is not only in point to show that a wife cannot sue her husband without a next friend, except in the single case of a suit for an absolute divorce, but also to show that if she does, the objection may be taken at any time, for the reason that it would be useless to go on with a suit which it was apparent to the court could not be sustained, and which had been prosecuted in open violation of the rules and practice of the court.

For these reasons this motion must be denied.

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## SUPREME COURT.

### MICHAEL DELAMATER vs. AMBROSE S. RUSSELL.

An execution may be issued against the person of a judgment debtor, where the judgment was recovered in an action for criminal conversation with the plaintiff's wife.

Such an action is for an "injury to the person" of the plaintiff under section 179 of the code.

*Albany Special Term, Feb. 1st, 1850.*—This was an action brought to recover damages for criminal conversation with plaintiff's wife, in which plaintiff recovered judgment for \$526.62 damages and costs. An execution against the defendant's property was returned unsatisfied, after which an execution was issued against the person of the defendant, under which he was arrested and imprisoned in Columbia county. The defendant now moved to set aside the latter execution on the ground that it was not authorized by the code in an action for *crim. con.*

C. L. MONELL, *for defendant.*

J. H. REYNOLDS, *for plaintiff.*

PARKER, Justice.—Section 288 of the code provides that an execution may be issued against the person of the judgment debtor, if the action be one in which the defendant might have been arrested, as provided in section 179 and section 181.

Section 179 authorizes the arrest of a defendant "in an action for the recovery of damages, on a cause of action not arising out of contract, where the defendant is not a resident of this state, or is about to remove therefrom, or where the action is for an injury to *person* or *character*, or for injuring or for wrongfully taking, detaining, or converting *property*."

It is under this clause of the 179th section that the authority to imprison the judgment debtor in this action is claimed.

I think the act complained of was an injury to the *person* of the plaintiff. It was an invasion of his personal rights. The action was brought for depriving the plaintiff of the "comfort, society, fellowship, aid and assistance" of the wife. Such was the language of the declaration under the former remedy by special action on the case. (2 Ch. Pl. 265.) This is the substantial injury still. The form of action only is changed.

*Rights of persons* are divided into *absolute* and *relative*. Criminal conversation is classed under actions for injuries to the latter. (1 Ch. Pl. 137.) This classification is related by all our elementary writers. (2 Kent's Com. 129 ; 3 Black. Com. 138.)

Blackstone says (3 Black. Com. 139,) "injuries that may be offered to a *person* considered as *husband*, are principally these : *abduction*, or taking away a man's wife ; *adultery*, or criminal conversation with her ; and *beating* or otherwise abusing her."

Slander or libel is an infringement of the *absolute* rights of persons and I have no doubt a judgment debtor would have been liable to imprisonment in these actions, if injuries to "character" had not been particularly mentioned in the statute. (2 Kent's Com. 16 ; 1 Chitty Pl. 137.)

It is not supposed that it was the intention of the Legislature to excuse from imprisonment judgment debtors in actions for *crim. con.*, seduction of a daughter, or beating of a servant ; and subject defendants to imprisonment in all other actions for wrongs : nor does the statute in my opinion demand any such construction. On the contrary, I think the language employed is used in its established legal signification, and, though it might have been more explicit, covers the class of actions in question.

The motion must be denied, but the question being a new one, without costs.



## SUPREME COURT.

In the matter of the Taxation of the Account of B. SLOSSON, late District Attorney of Ontario County.

A district attorney can only charge for *two subpoenas* for the same witness in the same case, from the commencement of the prosecution before the grand jury to its conclusion by verdict and final judgment, (*Session Laws*, 1839.) And this charge must apply to witnesses in cases where a *second trial* is rendered necessary in consequence of the disagreement of the jury on the first.

Where a witness duly recognized fails to attend in pursuance of such recognizance, he may be proceeded against by attachment in the same manner as if he failed to appear in pursuance of a subpoena. (*Sess. Laws*, 1845, ch. 180, p. 187, § 20.)

*Ontario Special Term, Dec. 1849.*—On the 15th November, 1849, the account of B. Slosson, Esq., as late district attorney of Ontario county, was taxed by Hon. Mark H. Sibley, county judge, &c. at \$743.97. The bill as presented, amounted to \$837.19, of which \$9.47 was disallowed by the county judge, by the consent of Mr. Slosson, as having been erroneously charged. The further sum of \$83.75 was also disallowed against the remonstrance of Mr. Slosson, leaving the amount at \$743.97, which was taxed as above. The said sum of \$83.75; was made up of charges for subpoenas for witnesses in criminal cases, exclusive of charges for subpoenas for such witness before the grand jury, and also exclusive of one subpoena for each of such witnesses before the court, in the same prosecution. A portion of these subpoenas were issued for witnesses who had been before subpoenaed and who, upon the postponement of trials were called for the purpose of having them recognized, and who failed to appear. Another portion was in a case where the witnesses had appeared on a former trial of the same cause in which the jury did not agree, and were discharged, and upon calling the witnesses to recognize them to appear at another term of the court for another trial of the same cause, they did not appear. The remaining portion were issued under the following state of facts, viz.: The causes in which they were issued were prior and up to the July Oyer and Terminer, 1849, in that court, at which time they were sent, by order thereof to the Sessions, the Oyer and Terminer having, on the first or second day of said term, dismissed the petit jury, at which time the witnesses had not appeared, and were afterwards subpoenaed to appear at the sessions.

In all the cases, the witnesses were deemed material by the district attorney.

The district attorney appealed from the taxation by the county judge under § 5 of ch. 375 of Session Laws of 1839.

T. M. HOWELL, *for appellant.*

G. GRANGER, *for supervisors of Ontario county.*

WELLES, Justice.—The first section of the act entitled “an act to regulate the fees of district attorneys, and to repeal the several acts relating to the same, passed May 7th, 1839,” among other things enacts as follows: “No other or greater fees shall be allowed to any district attorney in any county in this state, (the city and county of New York, and the counties of Erie, Genesee, Rensselaer, Washington and Onondaga excepted,) for any services rendered by him in the discharge of the duties of his office as chargeable against the said county, than such as are hereinafter provided.” The section then proceeds to provide for various services of the district attorney, and in relation to subpoena, is as follows: “For every subpoena actually and necessarily issued, returnable before a grand jury or court, twenty-five cents, including subpoena ticket; but no other allowance shall be made for any draft or copy of subpoena, or any draft or copy of subpoena ticket for any witness; and no more than one subpoena and subpoena ticket shall be allowed for each witness subpoenaed either before the grand jury or court; *and no allowance shall be made for any subpoena and subpoena ticket issued for the same witness, more than once in the same cause, except when it shall become necessary to subpoena the same witness before the court, after having been subpoenaed before the grand jury.*”

This seems to me to settle the question. Only one subpoena is to be charged for the same witness in the same cause, after the indictment found; and only one for the same witness before the grand jury; so that no more than two subpoenas can be charged, in any case, for the same witness, from the commencement of the prosecution before the grand jury to its conclusion by verdict and final judgment. There is no room for construction or interpretation of the statute. It may, in some cases, produce inconvenience to district attorneys, and may possibly require them, occasionally, to render a service without compensation. Indeed, this they have to do every term of the court. They are required to attend before the grand jury for the purpose of examining witnesses in their presence and giving them advice upon legal matters, (2 R. S. 725, § 32,) for which no compensation is provided; besides a great variety of other duties and labors, as the experience of almost every vigilant district attorney will prove. The Legislature has seen fit to select from their various duties a portion, for which compensation is given, doubtless

deeming that sufficient for the whole. Whether the compensation is adequate, is not for courts to determine.

With respect to the particular question under consideration, it is believed the Legislature upon the subject was prompted by complaints of recklessness, not to say rapacity, of some district attorneys, who were guilty, among other things, of neglecting to have the witnesses recognized, and thus creating a necessity for issuing subpoenas a second time, or oftener, for the same witnesses in the same cause. The evil was not only, or mainly, the expense of the additional subpoena, but it led necessarily to the expense of serving them, which, upon an average, was quadruple that of issuing them. To avoid this, the district attorney is to put the witness under recognizance to appear, if another attendance is necessary. If the witness disobeys the subpoena when duly served, he is in contempt, and may be brought in on attachment, and will be compelled to pay the expense of the proceeding against him, and may be fined besides, unless he shows a good excuse for not attending. After a witness is duly recognized and neglects to attend in pursuance of his recognizance, he may be proceeded against by attachment in the same manner as if he had failed to appear in obedience to a subpoena. (Session Laws of 1845, ch. 180, p. 187, § 20.) In this way the attendance of witnesses may always be secured, if at all, at all the different terms of the court, after the indictment is found, upon being once subpoenaed.

It may be that the statute is too strict with the district attorney in not allowing him to charge for the subpoenas for witnesses in case of a second trial becoming necessary in consequence of the disagreement of the jury on the first, as was the case with respect to a portion of these rejected items. It is usual, after the testimony on a trial is closed, to discharge the witnesses. It would be regarded oppressive upon them to require them to remain in attendance after their examination is closed, and until the jury are discharged, or to enter into a recognizance for further appearance in the same cause. But however this may be, the remedy is with the Legislature, and not with the judicial authorities. The statute before recited is too specific and comprehensive to leave any doubt upon the subject.

The taxation by the county judge is affirmed, and the appeal dismissed.

## SUPREME COURT.

## JACOB R. HALLENBECK vs. PHILIP B. MILLER.

Where, under the code, a sheriff is sued for an official act done by him and recovers judgment against the plaintiff, he is not entitled to recover double costs.

*It seems*, that the whole title of the Revised Statutes, establishing and regulating costs, of which the section allowing double costs is a part, is repealed by the code. (§ 303.)

*Albany Special Term, Feb. 26, 1850.*—In this case the defendant was sued for an act done as sheriff of Columbia county, and recovered judgment against the plaintiff. The defendant's counsel now moved for double costs, under the provision of the Revised Statutes.

C. L. MONELL, *for defendant.*

N. HILL, Jr., *for plaintiff.*

PARKER, Justice.—It was provided by the Revised Statutes, (2 Rev. Stat. 617, § 24,) that, in cases like this, the defendant should recover "his taxed costs and one-half thereof in addition:" and the next section declared that such additional costs belonged to the defendant and that the counsellors, attorneys and other officers, and the witness and jurors should be entitled to receive only single costs. The question here presented, is, whether this provision allowing double costs was repealed by the code. Section 303 of the code repeals "all statutes establishing or regulating costs, or fees of attorneys, solicitors and counsel in civil actions," and declares that "there may be allowed to the prevailing party upon the judgment certain sums by way of indemnity for his expenses in the action," which allowances are to be termed costs.

All costs are now made what the extra allowance to a sheriff was formerly declared to be, indemnity to the party, and not the measure of compensation for the attorney and counsel.

The section of the Revised Statutes allowing double costs, was a part of the title establishing and regulating costs, and I think it was the intention of the Legislature to repeal the whole of it, and to provide an entirely new measure of indemnity. The repealing language of the code is very broad and comprehensive, and other provisions of the code are, I think, inconsistent with the idea that double costs were to be recovered under it. Extra allowances are no longer fixed by law, either as to the amount or the cases in which they are to be allowed: but the courts are authorized to make such allowances, by a per centage on the amount recovered, or the value of the property in controversy, in difficult or ex-

traordinary cases and in certain other proceedings. I cannot think the Legislature intended that in such cases the costs were to be doubled.

The Revised Statutes allowed "the *taxed costs* and one-half thereon in addition." Under the code there is no taxation, except the final entry by the clerk, in the judgment, of the charges for costs and disbursements. The language is inapplicable to the present mode of proceeding; and the clerk is not authorized to enter in the judgment any more than is mentioned in sections 810 and 811; and after making the entry, which takes the place of taxation, the clerk certainly has no power to alter the judgment by adding to it one-half the amount.

I think the motion should be denied, but the question being a new one, without costs.

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## SUPREME COURT.

### MYERS vs. FEETER.

After the service of an answer, the defendant may move to change the place of trial before the service of a reply and before the expiration of the time to reply.

*Essex Special Term, January, 1850.*—B. POND, *for defendant*, moved to change the place of trial from Schenectady to Herkimer upon affidavits, showing material witnesses in the latter county. He said it was clear from the recent decisions, and the 47th rule of court, that the motion was not premature.

J. E. McVINE, *for plaintiff*, read an affidavit showing that the complaint was served on the 5th December, 1849, and an answer served on the 25th of that month by mail, which gave the plaintiff until the 3d of February to reply. That the answer set up new and material matter in defence, to which the plaintiff intended to reply. He said the parties could neither of them know what witnesses would be necessary until the issues were all taken. That the code does not abolish the distinction between *venue* properly and *the place of trial*. The *venue* properly, is the county in which the action must be tried according to sections 123, 124, 125, of the code, in all which cases the court have power to change the *place of trial*, for cause. He further contended, that by section 126, the Legislature had provided a simple remedy to the opposite party if the *venue properly*, was laid in the wrong county. In such case, the defendant may,

before the time for answering expires, *demand in writing* that the trial be had in the *proper county*. If the defendant pursues this simple remedy without success, the court would undoubtedly compel the plaintiff to pay the costs of the motion. But if he neglect this, the remedy given by statute for the change of the *venue*, the venue must remain in the *improper county* subject to the right of the defendant to move the court to change the *place of trial*, and that this can only be done on good cause shown *after issue joined*. The venue stands, but the place of trial is changed for convenience of witnesses or other cause. He cited in support of his views, (Code, §§ 123, 124, 125, 126; *Barnard v. Wheeler*, 3 How. Pr. R. 71; *Beardsley v. Dickinson*, 4 id. 81; and *Lynch v. Mosher*, id. 86, 89.)

He also submitted that the distinction made by the code between the change of *venue* and the *place of trial* was overlooked in the adoption of the new rules. (See Rules Sup. Ct., ed. 1837, R. 94.)

HAND, Justice.—Mr. Justice SILL, in *Lynch v. Mosher*, (4 How. Pr. R. 86,) came to the conclusion that the defendant need not move to change the place of trial until after issue joined. But I do not understand him, or Mr. Justice PARKER, in *Beardsley v. Dickinson*, (id. 81,) to say that the motion cannot be made until the reply is in, or the time for replying has expired. On the contrary, in the latter case, the motion was decided upon the merits, notwithstanding it appeared that the reply had not been served. And the review of the cases by the Judge, in *Lynch v. Mosher*, to my mind, shows clearly that the motion may be made before reply. The language of the former statute, under which it was held that the defendant must move the first opportunity, after service of the declaration, is very similar to that of the Judiciary Act. (2 R. S. 309, § 2; Jud. Act, § 49; Code, § 125; 11 Wend. 186; 4 Hill, 63, n.) In addition to this such, too, is the plain reading of the 47th rule of this court: "No order to stay proceedings for the purpose of moving to change the place of trial shall be granted, unless it shall appear from the papers that the defendant has used due diligence in preparing the motion for the earliest practicable day after the service of the complaint. Such order shall not stay the plaintiff in putting the cause at issue, or taking any other step except giving notice and subpoenaing witnesses for the trial without a special clause to that effect," &c.

These rules were made by the whole court, under the authority of the code, and may be considered as giving construction to the statute. The same court adopted the same rule immediately after the Judiciary Act became a law.

But the plaintiff shows that the answer contains new and material mat-

ter, and that he cannot yet determine what witnesses may be required upon the issues. It will rarely happen that the plaintiff in this stage of the cause will be ignorant of what he intends to traverse by his reply; but as the plaintiff states that he is so in this case, the motion must be denied, without costs and without prejudice, so that it can be renewed after the reply comes in.

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### SUPREME COURT.

#### JOSHUA G. COTTRELL vs. JAMES FINLAYSON.

Where an attorney has collected money for his client, he is liable to an attachment, if he fails to pay to his client on demand; but the bringing of an action and recovery of a judgment against the attorney, is a waiver of the right to an attachment. An attachment will not be issued against the attorney without a previous demand of payment.

*Albany Special Term, Feb. 1850.*—The affidavit showed that the defendant, as attorney for the plaintiff, had collected several sums of money from different individuals; that the defendant was at the time an attorney of this court; that plaintiff demanded payment, which was refused by defendant on the pretence that his account for services rendered exceeded the amount of the money collected. The plaintiff then instituted an action in this court and after a litigated suit recovered, on 14th January last, judgment against the defendant for \$54 damages and \$64.95 costs of suit.

The plaintiff now moves for an order that the defendant pay over the amount of the judgment or that an attachment issue.

C. A. PUGSLEY, *for plaintiff.*

C. STEVENS, *for defendant.*

PARKER, Justice.—In this case the plaintiff might have applied for an attachment in the first instance, after making demand of the money, (3 Caines, 221; 5 John. 368; 4 Cowen, 76; 6 Cowen, 596; 4 Hill, 42, 565.) Instead of doing so, he commenced an action which was litigated, and after having recovered a judgment in which the costs exceed the amount of money collected, now applies to this court for a more summary remedy. I think the proceeding by action was a waiver of the right to proceed by attachment. It seems to have been so regarded in *Bohanan v. Peterson*, 9 Wend. 503. It is not right to subject the defendant to the costs of a suit and also of the proceedings by attachment.

There is another objection to granting this motion. There has been no demand of the amount ascertained to be due by the result of the litigation, nor of the costs recovered. An attachment can never be issued without a previous demand. (*Ex parte Ferguson*, 6 Cowen, 596.) Motion denied, but without costs.

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## SUPREME COURT.

### CLARKS vs. STARING.

Where a witness is subpoenaed at his *temporary residence*, or place of business, and attends the circuit in pursuance thereof, and then returns, he is entitled to his travelling fees from such temporary residence, instead of his permanent residence.

Where a (material) witness was not subpoenaed until the night of the first day of the circuit (for the reason that he could not sooner be found,) and went to court the next morning, but arrived about an hour after the cause had been postponed, *held*, that there having been no laches chargeable to the party or witness, he having been subpoenaed and attended in good faith, he was entitled to his fees. Besides, he arrived in time to have been sworn, if the cause had been tried.

*Oneida Special Term, Dec. 1849.*—Appeal from the taxation by the clerk of the costs of the plaintiff at the late Oneida circuit, on the postponement of the trial of the cause.

W. HUNT, *for the defendant.*

A. BENNET, *for the plaintiff.*

GRIDLEY, Justice.—Two questions arise on this appeal. The first respects the allowance of the travelling fees of the witness Jerrolman, from the city of New York to the place of trial and returning after the close of the circuit. The *permanent residence* of the witness was in Whitestown, in the county of Oneida. He, however, went to the city of New York, on business, about one month before the circuit, and he was engaged in business there for about two months afterwards. He was subpoenaed in New York city, and came to the court solely in obedience to the subpoena, and returned to the city immediately after the postponement of the trial. No fraud or collusion between the plaintiff and the witness is pretended; but it is insisted that under the act of 1844, (See 2 R. S. 734, 3d ed.) the witness was only entitled to travelling fees from Whitestown, the place of his permanent residence. In aid of this position I am furnished with authorities defining the meaning of the word "residence," under the election law, the insolvent laws, and the act of 1831, which exempts a resident from arrest. The mean-



ing of words used in a statute, depends on the subject-matter of the enactment, and on the object and intent of its framers. The object of the Legislature in passing the act, the construction of which is now under consideration, was to compensate a witness for travelling to and from the court which he was obliged, by the process of the court, to attend. Ordinarily, a witness is subpoenaed at his permanent residence, and is thus entitled to his fees in travelling from such residence. In this case the witness was subpoenaed at the place of his *temporary residence* and *business*, and leaves his business just as long and travels just as far, and incurs just as much expense as if his permanent residence had been in New York city. His temporary residence, therefore, is the place from which to compute the distance which he travelled. Any other construction of the word residence, would fail to carry out the intention of the Legislature. It would be most unreasonable to require the witness to leave his business and travel from New York to Oneida county and back again, for the fees due for travelling from the town of Whitestown to Rome, merely because his temporary residence in New York would expire in some two months after he was subpoenaed. Such an interpretation of the word would be intolerable, not to say absurd.

2. The same objection is made in relation to the fees of the witness Willis, and must be disposed of in the same way. This witness was sworn to be material, and was subpoenaed on the night of the first day of the circuit, and arrived the next morning about an hour after the cause was postponed. The reason of the lateness of the time when this witness was subpoenaed, was that the plaintiff had not discovered where the witness could be found in season to make an earlier service of the subpoena. And though the cause had been called once, and by mutual consent had been passed without prejudice, yet, the witness arrived in season to be sworn, if the cause had been afterwards called and tried. I think the fees of this witness should be allowed upon the reason of the case. If the witness had been subpoenaed in season and had without good cause, omitted to be at court before the cause was put over, he would have been entitled to no fees. (See 5 Wend. 107, and 3 Hill, 457.) In the last of these cases, the fees were taxed, notwithstanding the witnesses were delayed by an accident till after the cause was sworn over. In the former case, the fees were disallowed because the witness by his own negligence had failed to be at court till after the cause was postponed. The court placing the right of the party to tax the fees against his adversary on the same ground with the right of the witness to demand them of the party. In this case, neither the plaintiff nor witness was chargeable with any laches. The

witness was subpoenaed in good faith, and had earned most of his fees when the cause was put over. Again, if the cause had not been put over, the witness would have been in season for the trial.

The motion must be denied.

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## SUPREME COURT.

JAMES LAMOREUX vs. HENRY MORRIS and others.

A solicitor for plaintiff in a partition suit, is not liable to be attached for not paying to one of the commissioners his fees included in the taxed bill, and collected from the defendants.

*Albany Special Term, Feb. 1840.*—This was an action of partition. The commissioner's fees had been taxed at \$185, in the bill of costs made out by C. A. Pugsley, Esq., the attorney for plaintiff. J. L. Van Valkenburgh, who was one of the commissioners to make partition, applied for an order that Mr. Pugsley pay him his share of the commissioner's fees, viz. \$61.66, or that an attachment issue. It appeared that Mr. Pugsley had collected all or nearly all of the bill of costs as taxed, and that demand from Mr. Pugsley had been made by the petitioner.

O. ALLEN, *for petitioner.*

H. G. WHEATON, *for Mr. Pugsley.*

PARKER, Justice.—This court has held that the attorney is liable for sheriff's fees, upon the ground that the sheriff is obliged to serve process. (1 Caines, 192; 5 John. R. 255, 368; 4 Wend. 474.) A different rule prevails in Vermont, (1 Ver. R. 101,) but I believe in this state it has never been decided that the attorney was liable for witnesses', referee's or commissioner's fees. In *Howell v. Kimsey*, 1 How. Pr. Rep. 105, it was decided that the attorney was not liable for referee's fees. I think the petitioner could not have recovered if he had brought an action against the solicitor. The solicitor received the money for the plaintiff. He was bound to pay it over to the plaintiff, or to account for it on settlement with him. There is no doubt of the plaintiff's liability to the petitioner.

But the petitioner asks for a remedy by attachment. To this certainly he is not entitled. There is no relation here between the solicitor and the petitioner, as between attorney and client. There is no

violation of confidence and no breach of trust. The money was collected for the plaintiff, and not for the petitioner. The latter had no agency in or control over its collection. The solicitor and the petitioner were both officers employed to perform several and different duties in the progress of the cause, but I do not see that they have any claims on each other. They can apply only to the plaintiff, and not to each other, for compensation.

Motion denied, with costs.

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## SUPREME COURT.

EDWARD T. SCHENCK agt. GEORGE MCKIE.

Where the service of a paper is made by mail, in pursuance of § 410 of the Code of Procedure, it must be deposited in the post office at the *residence of the attorney making the service*, addressed to the person on whom it is served, at his place of residence, and the postage paid.

When the paper is thus deposited in the proper post office, correctly addressed, and the postage paid, the service is deemed complete, and the party to whom it is addressed takes the risk of the failure of the mail.

A paper deposited by an agent of the attorney making the service, in a post office in a different town from that in which the attorney resides, is not a good service except from the time it is actually received.

An order from a county judge, staying proceedings, with a view to a motion to change the place of trial, does not, by the 47th rule, prevent the plaintiff from entering judgment unless there is some special clause to that effect.

A motion to change the place of trial may be made *before* issue has been joined in the cause. (See *Myers v. Foster*, *ante*, p. 240.)

The case of *Barnard et al. v. Wheeler et al.* 3 Howard Pr. R. 73, and *Lynch v. Mosher*, 4 id. 86, cited and explained.

*Washington Special Term, Dec. 1849.*—WILLARD, Justice. A motion is made on the part of the defendant to set aside a judgment by default, entered by the plaintiff in the Montgomery clerk's office, on the 29th October last. The defendant contends that the judgment was irregularly entered.

The first point to be determined on the question of regularity is, when the summons and complaint were served. Mr. Ingalls, the defendant's attorney, swears that the summons and complaint were brought to him by the defendant on the 21st September last, and that McKie informed him that they were served on the 19th September. The attorney does not swear to his belief of the truth of this information; and McKie, the defendant, although he has made an affidavit in the cause, is entirely silent

as to when those papers were served on him. The complainant swears positively that they were served by the sheriff of Washington county, on the 18th day of September. This, therefore, must be taken as the true day when the summons and complaint were served. The time to answer would expire on the 8th October, and on the 1st October, Judge Parker granted an order allowing twenty days *additional time* to prepare and serve an answer. This time would expire on the 28th October, and a judgment could be regularly entered on the 29th October. The plaintiff swears that when the judgment was entered, no answer had been received, and that none was received until the 31st October, when it was immediately returned.

The defendant insists that the answer was served in time, and the judgment irregularly entered, on the following grounds: 1st, as to service of the answer. It appears by the affidavits that the plaintiff, who is an attorney and conducts this action in person, resides in Fonda, Montgomery county, and Mr. Ingalls, the defendant's attorney, resides in Greenwich, Washington county. On the 26th October, the answer was prepared and sent by the defendant's attorney to the residence of his client in Cambridge, about twelve miles from Greenwich. The defendant being absent about fourteen or fifteen miles from home, the papers were left with his family. On his return home, the defendant swore to the answer before Mr. Crocker, in Cambridge; and the latter gentleman, on the same 26th October, folded the answer and affidavit in the form of a letter, and legibly directed it to the plaintiff at Fonda, and paid the postage from Cambridge, in which office he deposited it, to Fonda. The plaintiff admits that he received it on the 31st October, and not before; and the question is, whether the service was a good service on the 26th October, when it was deposited in the Cambridge office.

The 410th section of the code enacts that service by mail may be made, *when the person making the service and the person on whom it is to be made, reside in different places, between which there is a regular communication by mail.* "The person making the service," is the attorney on whose behalf it is done, and not an intermediate agent employed by him; were it otherwise, the attorney might employ an agent, living in a district, visited only by a weekly mail, and thus prolong the time for answering. This section of the code was adopted from the former practice. (See rule 7 of the old law rules.) The language of the rule was, that service by mail should be good in all cases where *the attorneys reside in different places, between which there is a communication by mail.* In one respect the code is more stringent than the rule, as it requires that

there should be a *regular* communication by mail between the two places, in order to make service available. It does not appear that there was a *regular communication* by mail between Cambridge, where the answer was mailed, and Fonda, where the plaintiff resided; or that there was any mail communication between them. If this answer had been mailed by the attorney at Greenwich, his place of business, addressed to the plaintiff at Fonda, and the postage paid, *Brown v. Briggs*, 1 Howard S. T. R. 152, is an authority to show that the service would be esteemed a good service on that day. Where the service by mail is regular, it seems the party to whom the paper is addressed takes the risk of the failure of the mail. (See *Radcliff v. Van Benthuyssen*, 8 How. S. T. R. 67.) He has a right, therefore, to insist that it shall be sent from the post office of the attorney, by whom the service is sought to be made—*Corning v. Gilman*, 1 Barb. Ch. Rep. 649, is in point. I think the service was not regular, and as it did not arrive until after the judgment, the plaintiff had a right to disregard it.

2d. It is urged that the judgment was irregularly entered, because it was entered in defiance of the order of Judge Lee, county judge of Washington county. It appears that on the 10th October, Judge Lee granted an order staying all proceedings on the part of the plaintiff until the decision of the Supreme Court on the motion, then noticed to be heard before Judge Willard, at his chambers, for the 30th October, to change the place of trial. This was served on the plaintiff on the 17th October, but was disregarded by him. It is plain by § 401, *et seq.* of the code, that the judge had no jurisdiction of the motion, at chambers, and consequently the order to stay proceedings for that purpose was void. It appeared on its face to be a nullity. An order was never a stay of proceedings unless accompanied with a notice of motion. But the notice of motion, to be of any efficacy to uphold the order, must be to a court having jurisdiction of the matter. Again, the 47th rule allowed the plaintiff to proceed to judgment unless the order specially directed otherwise.

On the whole, I think the judgment was regularly entered. But as the defendant swears to merits, he must be let in upon terms.

The judgment must be set aside on the payment of ten dollars' costs.

The defendant has connected with the motion to set aside the judgment, a motion to change the place of trial from the county of Montgomery, where the plaintiff resides, and which he has designated as the place of trial, to the county of Washington, where the defendant resides. The professed object of this motion is for the accommodation of the parties and their witnesses, as the cause of action is not in itself local, but transitory.

A preliminary objection is made to the motion, on the ground that the cause is not at issue. It is insisted that the court cannot entertain a motion to change the place of trial until after an issue joined in the cause. There is a *dictum* to that effect by HARRIS, Justice, in *Barnard et al. v. Wheeler et al.* 3 Howard Pr. R. 73. And it was observed by SILL, J., in *Lynch v. Mosher*, 4 Howard Pr. R. 86, that such motion, under the code, need not be made until *after* issue. In neither case, however, was the precise question now presented, necessarily involved, or in fact decided.

Under the former practice, a motion to change the venue, which was the same as the present motion to change the place of trial, was in general required to be made before plea pleaded, but was sometimes allowed after issue, when no trial had been lost. (1 Dunlap, 412.) The practice prior to, and under the Revised Statutes, is fully stated, and the cases are well collected in a note by the reporter to *Britain v. Peabody*, 4 Hill, 62, &c. Unless that practice has been changed by the Judiciary Act of 1847, or by the Code of Procedure, it is still regular to move to change the place of trial before issue. It is clear that the justices who revised the rules, in August 1849, in order to adapt them to the code, were of opinion that the former practice in this respect remained unchanged. (Rule 47.)

The 125th section of the code, relates solely to transitory actions, of which the present action is one, and it provides that they shall be tried in the county in which the parties or any of them shall reside, at the commencement of the action; or if none of the parties shall reside in the state, the same may be tried in any county which the plaintiff shall designate in his complaint, *subject, however, to the power of the court to change the place of trial, in the cases provided by statute.* There are no statutes on this subject but the Revised Statutes and the Judiciary Act, to which the code can refer. The Revised Statutes enacted the practice as it was at that time settled by the courts in transitory actions, without essential alteration. They required the issue in such actions to be tried in the county where the venue should be laid, unless the court should deem it necessary for *the convenience of parties and their witnesses*, or for the purposes of a *fair and impartial trial* to order such issue to be tried in some other county; in which case the same should be tried in the county so designated. And the 49th section of the Judiciary Act authorized this court to order an issue of fact joined in any suit, to be tried in any other county, on good cause shown therefor, and on such terms, and under such rules and regulations as the said court should prescribe. It is argued that because the Judiciary Act (L. of 1847, p. 333, § 49) uses the

expression "issue of fact joined," when authorizing this court to direct it to be tried in some other county; and because the Revised Statutes say that *issues of fact joined* shall be tried in the proper county, &c. (2 R. S. 409, § 1, 2;) therefore, the motion to change the place of trial cannot be made, until issue is in fact joined. But this argument, if it proves anything, proves too much. The act of 1786, entitled an act for regulating trials of issues, &c. (1 Green. Ed. 261, ch. 41,) enacts "that *all issues joined or hereafter to be joined* in the Supreme Court, &c. &c., shall be tried in the proper counties where the lands, tenements or hereditaments in demand or question, shall be situated, or the cause of action, suit, controversy or offence shall arise or be committed," &c., and the same phraseology is substantially retained in the act of 1813. (1 R. L. 325, § 1) The power of the court over the place of trial was an incident of its general jurisdiction, and was exercised for the advancement of justice, and the convenience of suitors and witnesses. The Revised Statutes neither increased or diminished it, but speak of it as an existing and well-known power. And the practice under the Revised Statutes continued the same as before, down to the present day. There is no absurdity in making the order for the trial of an issue of fact, in a particular country, before the issue is framed. It cannot be tried until after it is joined. But it can be known by the defendant as well *before*, as *after* issue, what facts will be material for him to prove on the trial. He knows what facts in the complaint he intends to controvert and what he expects to set up in his answer; and the affidavits on which his motion is founded, must disclose those facts to the adverse party. (See Rules 47 and 48; *Lee v. Chapman*, 11 Wend, 186.) The fair construction of the statute is, that the issue when joined, shall be tried, &c., although the order to change the place of trial may be made as soon as the plaintiff has indicated in the complaint the county he prefers for that purpose, and before such issue is joined. I do not perceive any reason, under the present system of pleading, for postponing the motion until after issue, which was not equally operative under the former system. There is precisely the same reason now as formerly, for requiring the motion to be made *before* issue, in order to prevent delay, and it cannot be made unless the defendant swears to merits. It is a fact of some significancy, that the commissioners of the code, have introduced and disposed of this subject, as a proceeding before issue. If it had been a matter which did not arise until after issue, would not an orderly disposition of the subject require that it should not be provided for until after they had treated of the several kinds of issues? I am satisfied that neither the Judiciary Act nor the code has limited the power of this court over the place

of trial in transitory actions, but that it remains substantially as before. (See Monell's Practice, 34.)

The motion, therefore, will not be denied upon the preliminary objection, but will be heard on its merits.

I have carefully read the numerous affidavits on the part of the defendant, and the affidavits in opposition, and am of opinion that there is no sufficient reason for changing the place of trial from Montgomery county, where it is laid, to the county of Washington.

The motion, therefore, must be denied, with ten dollars costs.

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## SUPREME COURT.

### LEWIS RADLEY vs. HENRY HOUGHTALING.

When facts material to the defence occur after the joining of issue, leave will be given, on motion, to set them forth in a supplemental answer, and the plaintiff will have 20 days to reply to such supplemental answer.

*Albany Special Term, Feb. 1850.*—This was an action for assault and battery; issue was joined in May, 1849. Since the commencement of this suit another action had been brought in the Albany Mayor's Court by the defendant against the plaintiff for slander, on which a trial had been had and a verdict was rendered for six cents damages. On that trial the defendant in that suit set up in mitigation of damages that he was provoked to the uttering of the slander by a violent assault and battery committed on him by the plaintiff immediately before the speaking of the slanderous words, in consequence of which only nominal damages were recovered. The defendant now moves for leave to put in a supplemental answer setting up such trial and recovery.

R. W. PECKHAM, *for defendant*, claimed that a supplemental answer was necessary to enable him to show the facts that had taken place since issue was joined; and insisted that the plaintiff, having availed himself of the assault and battery to reduce the recovery to six cents, could not now recover for the assault and battery: or, if not a bar, that such proof would be proper in mitigating damages—citing 2 Wend. 497; 13 do. 658; 2 Hill, 478; 3 do. 171; 1 John. R. 286; Cow. & Hill's notes, 828, 830, 960, &c.

JOHN J. TYLER, *for plaintiff*.



PARKER, Justice.—The code provides (§ 177) that the plaintiff and defendant respectively may be allowed, on motion, to make a supplemental answer or reply, alleging facts material to the case occurring after the former complaint, answer or reply. Under this section, the defendant is entitled to relief. I think the facts which transpired on the former trial are material to this case. How far they will go towards establishing a defence, it is not necessary to say. That question will be decided at the circuit in such a form as to afford to either party an opportunity to review the decision.

An order must, therefore, be entered, permitting the defendant to put in a supplemental answer within ten days, setting out the former trial and proceedings thereon and the judgment, on paying to the plaintiff the costs of preparing for and attending at the March circuit, and ten dollars for costs of resisting this motion. The plaintiff will have twenty days to reply to such supplemental answer.

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## SUPREME COURT.

OTIS B. HOWE and BENJAMIN F. SKINNER vs. JAMES MUIR.

The court and not the referee, must take the order for an extra allowance under § 308 of the code; so held, where the referee who tried the cause found a verdict for plaintiff, and then found "*that the cause was unreasonably defended within the meaning of section 308 of the code.*" (See *Gould* agt. *Chapin*, ante, page 185.) This extra allowance cannot be granted on an *ex parte* application to the court.

Application for a per centage under section 308 of the code.

J. P. WHITEMORE, *for the plaintiff*, presented the report of a referee finding in favor of the plaintiff the sum of \$123.59. "*And that this cause was unreasonably defended within the meaning of section 308 of the Code of Procedure.*"

GRIDLEY, Justice.—This application must be denied, for several reasons.

1. The court, and not the referee, makes the order for the extra allowance, and, of course, the court itself must decide *whether "the prosecution or defence has been unreasonably or unfairly conducted."* In this case no facts are presented to the court, upon which a decision can be based. The referee has assumed to decide that that question; and the court is left to perform only the formal duty of making the order. The referee had no power to pass upon this point. The statute has given it to the court alone.

2. It will follow, from what has been said, that the order cannot be granted on an *ex parte* application. When the cause has been tried by a referee, the court can decide upon the propriety of granting the allowance, only on a view of the facts on which the charge of unfairly or unreasonably conducting the defence is predicated, and those facts can be brought to the knowledge of the court only by an affidavit. Such was the practice under the provisions of the Revised Statutes, by which executors were charged with costs for "*unreasonably resisting or neglecting*" the payment of a demand. (6 Hill, 386; 22 Wend. 271; 9 id. 488; 6 id. 554.) The affidavit may be explained or contradicted. To enable the party to do this, he must have notice of the motion and of the grounds on which the application is made.

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## SUPREME COURT.

### YALE vs. GWINITS & CASLER.

Where a referee on the trial of a cause before him, (during an adjourned hearing,) personally examined a piece of machinery, the utility of which was the subject of the litigation, and during such examination, received explanations of its operation by two of the plaintiffs' material witnesses, without the knowledge or consent of the defendant: *held*, that the referees' report, which was in favor of the plaintiff, must be set aside for irregularity.

*It seems*, that the rule of law, which protects parties from any undue influence upon the minds of jurors, should be substantially applied to referees.

*Montgomery Special Term, Dec. 1849.*—Motion to set aside report of referee for irregularity.

The action in this case was founded on a promissory note. The defence was, that the note was given for the price of a lot of self-setting sawmill dogs purchased by the defendant Gwinits of the plaintiff, which the plaintiff warranted to be a good, useful and permanent machine, if well used, but which the defendants alleged was a useless and imperfect machine. The referee overruled the defence and reported in favor of the plaintiff for the whole amount of the note. The irregularity of the referee on which the motion was founded, was, his examination of the sawmill dogs in company with two of the principal witnesses of the plaintiff, one of whom was the plaintiff's son-in-law, and receiving from them explanations in regard to the machine. This examination occur-

red after the hearing had commenced and had been adjourned to a subsequent day, and was without the knowledge or consent of the defendants.

E. S. CAPRON, *for defendants.*

WM. BARRETT, *for plaintiff.*

PAIGE, Justice.—The objection made by the defendants' counsel to the regularity of the proceedings of the referee is not founded merely upon his examination of the sawmill dogs in question, but upon such examination being made in the absence and without the knowledge or consent of the defendants, with the assistance of Ransom and Cady, the two principal witnesses of the plaintiff, and upon his receiving, at the time of such examination, explanations from such witnesses, (one of whom was the plaintiff's son-in-law,) respecting the operation and condition of the sawmill dogs. It is insisted by the defendants' counsel that this was an irregularity on the part of the referee, which had an improper influence on his mind, prejudicial to the plaintiff. The plaintiff opposes this application upon the ground, that the defendants could not have been injured by the examination of the machine by the referee, as all its parts about which there was any dispute, were subsequently brought into court by the defendants, and also upon the ground that the irregularity of the examination by the referee was waived by the counsel of the defendants, on his being informed of such examination by the referee, on a subsequent hearing of the cause. There is a conflict in the affidavits in relation to the alleged fact of the communication of information to the defendants' attorney by the referee, of his examination of the machine, in the presence of Ransom and Cady; and also in relation to the fact that such examination was mentioned by the witnesses Ransom and Cady, in their testimony given on the subsequent hearing of the cause. If the defendants and their counsel were both ignorant of the examination by the referee of the machine in the presence of Ransom and Cady, until after the report of the referee was made, there could be no waiver of the irregularity. I think, however, that the weight of the evidence on this point is against the defendants. But upon a critical examination of all the affidavits, I have come to the conclusion that no information was given either to the defendants or to their counsel on the subsequent hearing of the cause, that the referee, at the time he examined the sawmill dogs, held any conversation with Ransom and Cady in relation thereto, and that he received from them at the time of such examination explanations respecting the operation and condition of the machine.

The question then arises on this motion whether the act of the referee

in receiving from Ransom and Cady explanations in relation to the operation and condition of the sawmill dogs in question, in the absence and without the consent of the defendants was such an irregularity as entitled the defendants to have the report set aside. If this question had arisen in relation to a juror, it would have been deemed an irregularity fatal to the verdict. The rule as laid down by Justice BRONSON in *Wilson v. Abrahams*, (1 Hill, 211,) is, "that when in the course of the trial, a juror has in any way come under the influence of the party who afterwards obtained the verdict," or "if the juror has been guilty of misconduct or an irregularity which, there is some reason to suspect," "had an influence on the final result," the verdict cannot stand. It was settled by the earlier cases in this court that the verdict will be set aside where there is some reason to suppose that the party moving may have suffered by the misconduct or irregularity of the jury of which he complains. (1 Hill, 211; *Smith v. Thompson*, 1 Cow. 221; *Horton v. Horton*, 2 id. 589; *Ex parte Hill*, 3 id. 355.) In *Oliver v. The Trustees of Springfield*, (5 Cow. 283,) the jurors, after retiring to deliberate on their verdict and before agreeing upon the same, told the constable that they had agreed, and he therefore allowed them to disperse. Before they re-assembled, some of them were in a bar-room where conversations in relation to the suit were carried on in their presence. The court directed the jury to retire and re-consider the case, which they did, although this course was objected to by the plaintiff's counsel, and afterwards they returned a verdict for the defendant. The verdict was set aside by the court both upon the ground that the jurors may have been influenced by the conversations out of doors, and the ground that they procured their separation by a very unbecoming artifice. I have strong doubts whether a referee ought to be regarded as standing in the same situation as a juror, as respects the question arising on this motion. He exercises the functions not of the jury alone, but of both judge and jury. The parties are indisputably entitled to the unbiassed exercise of his judgment upon the evidence as given at a public hearing in their presence, uninfluenced by any conversations held by him with third persons in relation to the matters in controversy. His decision should be founded alone upon the evidence regularly given on the trial of the cause in the presence of the parties. He is not allowed to decide the cause upon his own knowledge of the facts, nor upon any knowledge derived otherwise than from the evidence given on the trial. And he ought not to place himself in a situation which may expose him to be influenced in his decision by conversations held with third persons in the absence of the parties.

The referee in this case, in receiving the explanation of Ransom and Cady, respecting the machine in question, was doubtless unconscious of doing an act either improper or irregular. Nay, he may have felt perfectly assured that the information derived from these explanations did not have any influence on his mind prejudicial to the defendants. The law, we have seen, is so watchful in its protection of the parties from any undue influence upon the minds of jurors, that if there is only some reason to suspect, that an irregularity of theirs, although trifling in its character, has had an influence in the final result, their verdict must be set aside. And upon reflection, I have come to the conclusion, although doubtingly, that the same rule ought substantially to be applied to referees. In this case, I am not able to say that the information derived by the referee at the sawmill of the defendant Gwinita, from Ransom and Cady, did not have some influence on his report, and that the defendants were not prejudiced by it. There is certainly some reason to suppose that the defendants may have suffered by the information thus derived by the referee from Ransom and Cady. As the questions in this cause are purely questions of fact, and as they have once been passed upon by the referee, the cause, according to the decision in *Clark v. Crandall*, (3 Bar. Sup. Ct. R. 612,) ought not to be referred back to the same referee.

The report of the referee and all subsequent proceedings must be set aside, and the cause must be tried at the circuit unless a new referee is appointed. As the plaintiff is not shown to be in any way in fault, costs must abide the event of the suit.

The decision of this motion disposes of the motion to set aside the adjustment of the costs. It is not therefore necessary to pass upon the questions of regularity raised on that motion. As the defendants are entitled to have the report and all subsequent proceedings set aside for the irregularity of the referee, the motion in relation to the adjustment of costs are unnecessary. To dispose of that motion, it may be denied without costs to either party.

## SUPREME COURT.

## HIRAM PIERCE vs. JOSEPH A. CRAINE and E. B. FERNE.

Where an execution has been issued, under the old law, upon a judgment docketed under that law (prior to the passage of the code,) and returned unsatisfied, a *second or pluries* execution may issue, as heretofore, *without an order of the court*, though more than five years (Code, § 284) may have elapsed since the entry of judgment. (See *Merritt v. Wing*, *ante*, p. 14. See the case of *Catskill Bank agt. Sanford*, *ante*, 101, which seems to hold a contrary doctrine, although this particular question was not involved in that case.)

This is a motion to set aside the execution in this cause. The judgment in the cause was docketed November 19th, 1839, and on the 30th of October, 1840, an execution was issued upon the judgment, and the same was returned unsatisfied. And on the 25th day of April, 1849, a second execution was issued thereon, and which was on the 8th October, 1849, returned unsatisfied, and on the 12th October, 1849, a third execution was issued thereon and a levy was made upon some property of the defendant Ferne. This execution commanded the sheriff, as before commanded, that he cause to be made \$420.06, the amount of the judgment, and the endorsement was to levy this amount and interest from the 19th November, 1839, the time of docketing the judgment, and that he have those moneys before our justices of the Supreme Court, within sixty days from the receipt of said execution to render to the plaintiff, &c. And the defendant now moves to set aside this execution for the reasons and upon the grounds hereafter stated.

MASON, Justice.—The main ground relied upon by the counsel for the defendant is, that the execution in this case was irregularly issued, for the reason that more than five years had elapsed since the entry of the judgment, and that no execution can issue in such case under the present Code of Procedure, only by special leave of the court, and that no order giving the plaintiff leave to issue his execution in this case had been obtained. The 283d section of the code provides that writs of execution for the enforcement of judgments as now used are modified in conformity to this title, and then enacts that the party in whose favor judgment has been heretofore, or shall hereafter be given, may, at any time within five years after the entry of judgment, proceed to enforce the same as prescribed by this title; and by § 284 of the code, it is enacted that after the lapse of five years from the entry of judgment, an execution may be issued only by leave of the court on motion, with notice to the adverse party; and provides that such leave shall be given

unless it be established by the oath of the party or other proof, that the judgment, or some part thereof, remains unsatisfied and due. (Laws of 1849, page 671, § 284.)

These provisions in relation to the issuing of executions to enforce judgments, are new.

Our statute of 1787, which may be found in 1 R. L. p. 89, § 34, was substantially the statute Edward I. chapter 6, and which confined the plaintiff to one year to have execution of his judgment, and this statute continued in force in this state up to the revision of 1880. This statute provided that execution of the judgment might be had at any time within a year, and then enacted that when execution be levied, had or made of a further time passed than one year, that the sheriff shall be commanded that he make known to the party that he or she be before the justices or court at a certain day, to show if he or she have any thing to say why such matters enrolled ought not to have execution, &c.; and then provides that if the defendant do not come, or come and say nothing why execution ought not to be done, then the sheriff shall be commanded to cause the judgment enrolled to be executed. This statute was adopted in most of the states of the Union. The courts in England have always held that when the execution was issued upon the judgment within the year, and returned unsatisfied, that an *alias* or *pluries* execution might be afterwards issued without a *sci. fa.*, by making a continuance upon the roll, and which was regarded as but continuing the same execution of the judgment. It is held, however, in England, that the continuance upon the roll is not now required to connect the second execution with the first, (14 M. & W. 336; 3 Dowl. & L. 38,) and it is still held there that a new execution may be issued at any time if the first has issued within the year and a day, without a *sci. fa.* (3 Dowl. & L. 554; 10 Jurist, 249.) The courts of this state have given the same construction to this statute, and held that one execution having been issued within the year, that another might be issued afterwards without a *sci. fa.* (5 Cow. R. 446; 1 Cow. R. 36; 9 J. R. 391.) I have looked into the reports of a large number of the different states of the Union, and I find that without exception, so far as I have examined, that they have all held that if the first execution be issued within the year, that a second or third execution may afterwards go without a *sci. fa.* or any order of the court. In some of the states it has been decided that the first execution must be returned, and the second or other execution connected with the first by a continuance upon the roll, while in several of the states it is held that no continuance need be entered upon the roll, and such is the rule established by the courts in this state and

in Pennsylvania. (8 J. R. 106; 9 J. R. 391; 1 Cow. R. 36, note *a*; 2 Serg. & Rawle, 142, 156.)

In the revision of 1880, our Legislature changed essentially the language of the statute in relation to the issuing of executions, and gave the plaintiff two years from the filing of the record in which to have execution of his judgment, and the courts have given the same construction to this statute, and have held that when the first execution was issued within the two years, that the plaintiff might at any time afterwards have a second or third execution without a *sci. fa.* or leave of the court. We are now led to consider the present statute. (Laws of 1849, page 671, § 283 and 284.) This 283d section of the statute extends the time to the plaintiff to have execution of his judgment for the period of five years from the entry of the judgment, or, in other words, provides that the plaintiff may enforce his judgment by the writ of execution at any time within five years after the entry of the judgment, and then comes section 284, which provides that after the lapse of five years from the entry of judgment, an execution may be issued only by leave of the court on motion, with notice to the adverse party, and goes on and states the proof which the plaintiff shall make to entitle him to it. The sole object of the interpretation of a statute is to discover the intention of the law-makers. The question arises, then, did the framers of this statute intend to abridge the plaintiff's right to have the execution of his judgment, or did they intend, by the 284th section, to overrule by legislation the construction which the courts in England and in this country had put upon the former statutes, limiting the time of the plaintiff to have execution of his judgment? I am inclined to think they did not. It is a general maxim in the construction of a statute that the words used are to be interpreted and explained conformable to general usage. (Smith's Com. on the Construction of Statutes, 629.) And it is a general rule that when words have received a definite construction by judicial sanction, and such construction has been long acquiesced in, that they shall be taken to have that construction when used in a statute. Now if we limit the language of this 284th section, in its application, to the issuing of the first execution, as the courts have construed all our former statutes upon this subject, and regard the second or subsequent execution as connected with the first and but a continuation of it, whether the entry which shows the connection or continuance be entered upon the roll or not, as has long since been the doctrine of the courts in England and in this state, then the language of this section may have its full force and effect without any other change of the prior law upon this subject than to extend the time from two to five years



to the plaintiff to issue his execution, permitting the plaintiff at the same time to continue the execution of his judgment by new issues after the five years, as was the practice under our former statutes. I think the statute is susceptible of such a construction, and that we shall be doing no violence to the intention of the Legislature in permitting such a construction to obtain. When the prior execution has been issued and returned by the sheriff, under his official oath that the same is unsatisfied, or that it is unsatisfied in part, why the need of putting the plaintiff to the trouble and expense of a special motion to the court for leave to enforce a judgment, which the records of the court show by the sheriff's official return, is unsatisfied. There may be a sufficient reason for requiring this to be done when the judgment stood five years, and the record shows that the plaintiff has made no move to collect the judgment. I am of opinion, therefore, that the execution in this cause was properly issued without an order of the court.

There is nothing in the objections raised as to the form of the execution. It is made returnable within sixty days, as required by section 290 of the code, (Laws of 1849, page 673,) and is a substantial compliance in form with the requirements of section 289 of the same chapter of this statute. If it were defective in the respects urged by defendant's counsel, I should not set it aside, but should apply the 176th section of the code to the case and disregard it, or else section 173 and direct it to be amended. This motion must be denied, but as the practice may be said to be in great doubt upon this point, I am not disposed to give the plaintiff costs of opposing.

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## SUPREME COURT.

### ISAAC W. THOMPSON VS. LEONARD BLANCHARD, &c.

The old practice of moving on a case, or bill of exceptions, to set aside a verdict or nonsuit, and all the proceedings to review, by the Supreme Court at general term, the rulings and decisions of a single justice thereof at circuit, are still in force in all suits commenced before the code took effect, and must be adopted and pursued in such cases. (See same cause reported on a similar question, 3 How. Pr. R. 399.)

*General Term, Jan. 1850.*—Motion by defendant to amend the judgment-record by incorporating therein the bill of exceptions, and for a stay of proceedings.

This suit was commenced before the original code took effect. It was tried at the October circuit, 1848, for Washington county. The plaintiff recovered a verdict. The defendant, according to the old practice, made and served a case to enable him to move to set aside the verdict. To the

case so made and served, the plaintiff under a protest proposed amendments. The case and amendments were settled by the justice who tried the cause. The case contained a stipulation giving to either party the right to turn the same into a bill of exceptions. The cause on the case was brought on to argument at a general term of the Supreme Court for this district, and was argued by the plaintiff and the counsel of the defendant, and at the general term of the Supreme Court held in September, 1849, the motion for a new trial made on the part of the defendant was denied. The defendant has since such decision turned the case into a bill of exceptions, and has procured the signature thereto of the justice who tried the cause and has filed the bill of exceptions with the clerk of the county of Washington. The defendant since he so filed the bill of exceptions has brought an appeal to the Court of Appeals and has taken the steps required by the code to make such appeal effectual.

By the Court, PAIGE, Justice.—It is objected that the motion of the defendant to amend the judgment record should not be granted, upon the ground that the Supreme Court had no jurisdiction of the cause on the case made by the defendant, as it was not brought up before that court at a general term by appeal from the decision of Justice HARRIS, who tried the cause, under the 4th chapter of the title of the original code relative to appeals. I think this objection is not well founded. The original code (8th section) was made applicable only to civil actions commenced after it should take effect. And the supplemental act did not make chapter 4 of the 11th title of the code in relation to appeals in the Supreme Court from a single justice thereof to the general term applicable to existing suits. This left the old practice in full force and applicable to all proceedings to obtain a review of the rulings and decisions of a single justice at circuit by the Supreme Court at a general term in suits commenced before the code took effect. Sections 469 of amended code and 889 of the original code, declare that the rules and practice of the courts, where consistent with the code, shall continue in force subject to the power of the courts to relax, modify or alter the same. The amended code has made no alteration in this respect, and in all suits commenced before the original code took effect parties intending to move to set aside a non-suit, or verdict, must still make and serve a case or bill of exceptions according to the old practice of the court and found his motion thereon. An appeal in such cases to the general term according to the provisions of the code cannot be taken.

I am aware that section 323 of the amended code which was section 271 in the original code abolishes writs of error and declares that the

only mode of reviewing a judgment or order shall be that prescribed by the code, and that this section is made by the supplemental act applicable to existing suits. But this section, so far as existing suits are concerned, must be deemed as being applied to appeals to the Court of Appeals; to appeals to the Supreme Court from an inferior court, and to appeals to a County Court from a Justice's Court; all which are by the supplemental act made applicable to existing suits. The significant omission in the supplemental act of every section of the code which relates to appeals in the Supreme Court, from a single judge to a general term, among those made applicable to existing suits, very clearly shows that the Legislature intended to leave in force the old practice of moving on a case or bill of exceptions, to set aside a non-suit or verdict in all suits commenced before the code took effect.

The case of *Tilly v. Philips* in 3 How. Pr. R. 865, cited on the argument of this motion has no application to the question now under consideration. In that case the question was whether an appeal under the amended Judiciary Act of 1847, from an order made upon a bill of exceptions by the Supreme Court, would lie to the Court of Appeals, where the order was made after the code took effect. In that case the plaintiff had taken a bill of exceptions and the Supreme Court had granted a new trial and the defendant had appealed to the Court of Appeals. This case is also reported in Comstock, (1 Comstock, 610.) The other cases in Comstock to which I have been referred by the plaintiff, (1 Comst. 228, 423, 429,) are all cases relating to appeals to the Court of Appeals from the Supreme Court, and are not applicable to the question, as to what is the proceeding which must be adopted in suits existing when the code took effect, to obtain a review by the Supreme Court at a general term, of the rulings and decisions of a single justice thereof at circuit, which is the question now under consideration. The 11th section of the amended code authorizes the defendant in this case to take an appeal to the Court of Appeals. That section gives the Court of Appeals the power to review every actual determination of the Supreme Court made at a general term in an action commenced therein.

But if the cause was not properly brought before us at a general term on a case made in accordance with the old practice, I think the plaintiff by acquiescing in the mode adopted by the defendant to obtain a review of the rulings of Justice HARRIS at the circuit, waived any objection which he might have taken *in limine* to the proceedings of the defendant and to the jurisdiction of this court.

The defendant is entitled to the relief asked for in his notice of motion

## SUPREME COURT.

## ANDREW MURRAY vs. LEORID HASKINS.

Where a constable is sued, under the code, for acts done by him by virtue of his office, and recovers judgment against the plaintiff, he is entitled to recover *double costs*, under 2 R. S. 617, § 24 and 25.

(*It will be seen that this decision is directly adverse to the one in Hallenbeck v. Miller, ante, page 239.*)

*Erie Special Term, Jan. 1850.*—The defendant is a constable and was sued for acts done by him by virtue of his office. The cause was referred, and the referee made a report for the defendant. He now moves for an order directing the clerk to insert in the judgment double costs.

— STEWART, *for the defendant.*

T. T. SHERWOOD, *for plaintiff.*

SILL, Justice.—The Revised Statutes provided, that if judgment be rendered for the defendant in an action against a public officer, appointed under the authority of this state, or elected by the people, for, or concerning any act done by virtue of his office, the defendant should recover his taxed costs, and one-half thereof in addition. (2 R. S. 617, § 24.)

It is under this provision that the defendant now claims to recover double costs. The plaintiff contends that this section has been repealed by the Code of Procedure. He relies upon the 303d section which repeals "all statutes establishing or regulating the costs or fees of *attorneys, solicitors and counsel* in civil actions," and provides that an allowance may be made to the prevailing party, of certain sums by way of indemnity, for his expenses in the action, which are in the code, "termed costs." Before the adoption of the code the fees of attorneys and counsel were fixed by statute and the prevailing party recovered against his adversary these fees as costs. Although the statute did not declare so in terms, yet the recovery of these fees was allowed then as now, in fact by way of indemnity for the expenses of the action. The code has established a tariff of allowances, which is in substance and for all practical purposes, a new fee bill under another name; and the object of the 303d section was to prepare the way for this new measure of recovery, for attorney's and counsel-fees. In doing so, it has repealed former fee bills, and also, (by a provision not affecting the present question) declared that these allowances in an action shall not govern the amount of compensation between attorney and client. The principle upon which a party is indemnified for being forced into an unjust litigation, is the same now as before.

Public officers are many times (especially executive officers,) from the nature of their duties, more exposed to prosecution than private citizens. And the object of the law under consideration (2 R. S. 617, § 24 and 25,) was to give them when wrongfully prosecuted in addition to the indemnity for expenses allowed to private individuals, some compensation for their own trouble about the suit, and also by an imposition, in the nature of a fine, upon the prosecutor, to afford them protection against vexatious and unfounded actions. The allowance above single costs belongs to the party, and no part of it goes to the attorney or counsel or other officer of the court, nor to the jurors or witnesses. They receive only their single fees, (§ 25.) The subject of this enactment and that of the fee bill are not kindred in their character, and have no necessary connection. The amount of the taxed costs in the suit is referred to incidentally in section 24, and is made the basis of a convenient rule, equitable in its general application to determine in every case the amount of the extra recovery. This does not make it a part of any statute "establishing or regulating the costs or fees of attorneys, solicitors or counsel."

These views give full scope and meaning to the *terms* of section 303: and I am satisfied that it was not designed to interfere with the statute giving public officers double costs. (See 1 Rept. of Com's on Practice, page 206, *et seq.*)

Sections 24 and 25, above cited from the Revised Statutes, are not inconsistent with the code; and they are substantially applicable to actions provided by it. They are therefore retained by section 471, a part of which is as follows: "Until the Legislature shall otherwise provide, this act shall not affect any existing statutory provisions not inconsistent with this act, and in substance applicable to actions hereby provided."

The clerk must insert in the judgment in this case the costs allowed by the code and fifty per cent. on that sum in addition thereto.

## SUPREME COURT.

BURR SEELEY agt. CLARK S. CHITTENDEN and others.

Principles on granting new trial for newly discovered evidence stated.

Proof of an *alibi* is not matter of impeachment, within the rules which refuses a new trial for the sake of impeaching a witness.

The general rule in litigated causes, is for each party to put in all his evidence before resting, and to be confined afterwards to evidence in reply.

The order of proof it seems is much under the discretion of the presiding judge.

Where a plaintiff in an action for tort which lasted two days, reserved his principal witness against one of the defendants until the close of the case, and then took the defendant by surprise, and the defendant showing an *alibi*, on his motion for a new trial for newly discovered evidence, the court granted a new trial, and in consequence of the plaintiff's irregularity in so reserving the witness, excused the defendant from paying costs.

It seems to be the practice on a motion for a new trial for newly discovered evidence, for the party making the motion to have the case made and settled containing the evidence given on the trial, so that the court may see the materiality of the newly discovered evidence.

It is too late to raise the objection that the case is not settled, after commencing the argument. The party objecting should move to strike the cause from the calendar.

In a joint action of tort against several, where all have united in the plea of the general issue, there may be a new trial as to one of the defendants, leaving the verdict undisturbed as to the others.

*St. Lawrence Special Term, August, 1849.*—This is a motion for a new trial on the ground of newly discovered evidence and surprise, and was argued at the St. Lawrence special term in August, 1849. The action was assault and battery and false imprisonment brought against Chittenden and three others, for discharging a loaded gun at the plaintiff, whereby he lost a leg, and for unlawfully arresting and imprisoning him. The occurrence took place at Hopkinton, St. Lawrence county, in February 1848. The cause was tried before HARRIS, J., at the St. Lawrence circuit in June, 1849, when a verdict was found for the plaintiff, against all the defendants for \$2000. It was not pretended that Chittenden fired the gun, but he was sought to be implicated with the other defendants, all of whom were in a crowd surrounding the plaintiff, when he was arrested, and one of whom discharged a loaded gun at the plaintiff. The defendant Chittenden was connected with the transaction, by the testimony of one Young, introduced on the part of the plaintiff, at the close of the case on the second day of the trial, who swore that Chittenden gave the word "fire." The fact is positively denied by Chittenden, and he has given satisfactory proof that at the time the word fire was given, he was not among the crowd, but in his own store, at a dis-

tance from the affray, and taking no part in it. He swears that he was taken by surprise by the testimony of Young. Other facts are stated in the opinion of the court.

The motion was argued by

WM. A. DART, *for the defendant Chittenden.*

JAMES & BROWN and C. G. MYERS, *for the plaintiff.*

WILLARD, Justice.—The principles by which this court is governed in granting new trials on the ground of newly discovered evidence were elaborately discussed in *The People v. The Supreme Court of New York*, (5 Wend. 114, and S. C.) on demurrer to the return to the mandamus, (10 Wend. 285.) The following principles were treated by Chief Justice SAVAGE as settled: "1. That the testimony must have been discovered since the former trial. 2. It must appear that the new testimony could not have been obtained with reasonable diligence on the former trial. 3. It must be material to the issue. 4. It must go to the merits of the case, and not to impeach the character of a former witness. 5. It must not be cumulative." It cannot be denied in this case, that the testimony offered is material to the main issue in the cause, nor that it has been discovered since the former trial. The defendant, Clark S. Chittenden, swears positively that he did not give the order to fire, and that at the time the gun was fired he was in his store and had been for twenty minutes before. He could not, therefore, have presumed that any person would swear that he did give the word "fire," at the time the gun was discharged, which occasioned the injury to the plaintiff, for which this action was brought. He is not, therefore, chargeable with *laches* in not preparing to disprove the fact of his having given such an order. The testimony goes to the *merits* of the action and not merely to impeach a witness. Although the effect of the evidence will throw a doubt over this testimony of Young, and thus indirectly impeach either the accuracy of his hearing or recollection, or his integrity as a man, yet this is not such impeachment as the rule in question contemplates. That rule has in view evidence bearing solely on the collateral issue of character and not the indirect impeachment resulting from the proof of a material fact in the cause. Nor is the testimony *cumulative*, within the meaning of the rule. The principles applicable to that branch of the subject were discussed by SAVAGE, Ch. J. (Sup. 10, Wend. 293, 294.) "Cumulative evidence," says the learned Judge, "means additional evidence to support the same point, and which is of the same character with evidence already produced." The defendant was not apprized by the pleadings, of the particular evidence that would be adduced

against him. Nor is it shown that he knew before the trial, that Young would charge him with giving the word of command and thus connect him with the battery. This was not the point mainly litigated on the trial, for the defendant swears that he did not know that it would arise until the testimony was given.

The granting a new trial on the ground of newly discovered evidence rests very much in the sound discretion of the court. This discretion is governed by fixed rules. In determining whether a particular case calls for the exercise of that discretion, courts have a right to look at all the surrounding facts and circumstances attending the trial. From the affidavits it appears that this trial commenced on Saturday, at the court house in Canton; that the plaintiff rested his cause about noon of that day, without swearing his principal witness, Young; that the defence occupied the remainder of Saturday and a part of Monday, and that it was not until after the defendant rested on Monday, that the witness Young was introduced by the plaintiff. The affidavit of the plaintiff's attorney shows that the witness had been in attendance during the entire week. Why was his examination postponed until so late an hour? The general rule, in the trial of litigated causes, is, for each party to give all his evidence before he rests, and to be confined subsequently merely to evidence in reply. Had this course been adopted here, the defendant would have had the whole of Saturday afternoon and Monday forenoon, to procure from a distance of only eighteen miles, the witness he now seeks to introduce. The course pursued by the plaintiff on the trial gave him not a moment. The main blow was reserved by the plaintiff till the defendant had neither the means to repel it, or to escape from its force.

I am aware that the mode of conducting the examination of witnesses at *nisi prius*, is, and must be much under the discretion of the judge who presides; and that in country courts, we have not always held the parties to the strictness in this respect, which is almost invariably adopted in the large cities and towns. The better knowledge the counsel and parties have of their witnesses in the country, renders the rigorous enforcement of the rule in question unnecessary, and sometimes oppressive. But, still, it is open to observation that in the present case, the defendant was taken by surprise at the close of the trial, by the testimony of a witness, who, according to the general usage at the circuit, should have been examined two days before. This *surprise* gives point and force to the present application; and more especially so, when we consider that it was occasioned by the plaintiff himself. Ought he to be permitted to retain an advantage which he has thus unfairly obtained?



This case presents stronger equities for a new trial on the ground of newly discovered evidence than that of *Sergeant v. Dennison*, (5 Cowen, 106, 122, 123.) In that case it was remarked that proof of an *alibi* does not fall within the rule of impeaching a witness. The remarks of SUTHERLAND, J., in the conclusion of his opinion, (p. 122, 123) bear strongly in favor of the present motion. The case of *Shumway v. Fowler*, (1 J. R. 425,) and *Durya v. Dennison*, (5 id. 249,) are distinguishable from this case, and, indeed, afford illustrations of the rule which forbids a new trial merely to impeach a witness on a former trial. In the present case, the motion assumes that Young swore to the truth as to the main fact, that the order to fire was given and obeyed. It controverts the fact that the plaintiff gave it by showing an *alibi*; a fact which Sutherland says, *supra*, is not matter of impeachment. The fact that such order was given by somebody is not denied, and was indeed proved by other witnesses. Young might well have been mistaken in the person by whom it was given. The defendant, knowing that such order was given by others and not by himself, could not be presumed to foresee that the plaintiff could find a witness, who, at the last moment of the trial, would swear that the defendant gave the order.

With regard to the objection that the plaintiff has not had time to have the case or bill of exceptions settled, it is to be observed that this is not the mode in which it should be taken. He should have moved to strike the cause from the calendar, or to postpone the argument, neither of which was done. The case is shown by the affidavit of the defendant's attorney to contain all the material evidence that was given on the trial. The plaintiff's attorney merely swears that "the bill of exceptions is very defective," but does not show in what respect. The present motion required only a statement of the material evidence given on the trial, in order that the pertinency of the testimony offered might be perceived. As a general rule the better practice is to have the case settled or agreed upon, before such motion as the present is made. But the plaintiff, by going to argument on the merits, has waived a compliance with this technical rule.

Nor is there any force in the objection, that, as the defendants united in the plea of not guilty, and the verdict is against several, a new trial cannot be granted on the application and in favor of one alone. The rule which makes all who unite in the same *justification* share the same fate, is technical, and was never applied to the general issue. It is competent under the plea of not guilty for the jury to find for one or more of the defendants and against the rest. It is every day's experience where several are sued for the same tort, for the court to direct the acquittal of

a part, and suffer the cause to proceed as to the rest. This was done by the learned judge, with respect to one of the defendants on the present trial. See *McMartin v. Taylor*, (2 Barb. S. C. Rep. 356,) as to this practice. If this may be done, no objection is perceived to the granting of a new trial as to one of several defendants, against whom a verdict has been rendered for a tort.

There must be a new trial granted to the defendant, Clark S. Chittenden, with costs to abide the event. This rule is usually granted on payment of costs, but as the motion is rendered necessary in consequence, in part, at least, by the plaintiff's own act, I think he should be excused from costs as the condition for granting the rule, and that they should be left to abide the event.

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### SUPREME COURT.

WILLIAM WHEELER vs. ROBERT WESTGATE, and two other causes.

In an action of slander, where the plaintiff recovered less than \$50 damages, *held*, that he was entitled to recover *the fees of officers and disbursements*, in addition to the amount of costs equal to the verdict.

(The cases of *Taylor v. Gardner*, *ante*, p. 67; *Newton v. Sweet*, *ante*, p. 134, and *Belding v. Conklin*, *ante*, p. 196, commented upon and the latter concurred in.

*General Term, March, 1850.*—Messrs. WELLES, SELDEN and JOHNSON, Justices.

By the Court. JOHNSON, Justice.—These three causes were all actions of slander, in which the plaintiffs severally recovered verdicts for less than \$50. The disbursements and fees of officers in each case were nearly or quite \$100, and were inserted by the clerk in the judgment, in addition to an amount of costs equal to the verdict in conformity with the rule laid down by Justice HARRIS, in *Newton v. Sweet*, 4 How. Pr. R. 134, and *Taylor v. Gardner*, *id.* 67.

Motions were made at the last special term in Monroe county, to strike out all the costs, disbursements and fees of officers, over and above the amount found by the jury in each case, and the justice ordered them to be heard at the general term.

I have looked carefully into those decisions, and the provisions of the code, and entertain no doubt whatever, that the decisions referred to are based upon an imperfect and erroneous view, both of the letter and spirit of the provisions of the code on the subject of costs.

By looking at the 303d section, one object the Legislature had in view will be rendered quite apparent, and that was to abolish all laws giving fees to attorneys, solicitors and counsellors, and give to the prevailing party, instead thereof, a certain sum by way of indemnity for his expenses in the action. And this section declares that this allowance shall be termed costs in this act. Subsequent sections provide for this allowance.

But nowhere have I been able to find any provision declaring that nothing else shall be regarded as costs, or any language that to my mind manifests the least intention on the part of the Legislature to change the well-known signification of the term costs—much less to declare that disbursements and the fees of officers allowed by law, shall no longer constitute a part of the costs of a suit.

On the contrary, I think it quite obvious that they intended only to alter or abolish one portion of the law regulating costs, and gave the prevailing party the same thing in a different form, and declare that that allowance should be termed costs in that act.

The term costs, as used in section 304, obviously, as I think, comprehends all the costs of a suit as heretofore used and understood. It prescribes in what actions costs shall be allowed, of course to the plaintiff, upon a recovery. In the 4th subdivision of that section, which prescribes that in certain actions, among which is the action of slander, if the plaintiff recover less than \$50, he shall recover no more costs than damages; it is provided that in certain cases where several actions shall be brought upon the same instrument against several parties who might have been joined, *no costs other than disbursements* shall be allowed in more than one of such actions. This certainly does not indicate any intention "to change the meaning of the term costs." On the contrary it expressly recognizes disbursements as costs. By section 305, costs are to be allowed to the defendant of course, in the actions mentioned in section 304, unless the plaintiff be entitled to costs therein. Under this section is not a defendant, who recovers costs, entitled to his disbursements as a part of his costs? In actions of this description there never were but two subjects of recovery—the one, damages as measured by the verdict of the jury, the other, costs following the recovery as prescribed by law. Disbursements, therefore, are to be recovered either as damages or costs.

Did the Legislature intend to change the meaning of the term damages also? It is to be noticed that the provision limiting costs to the amount of damages recovered, is in the exact language of the provisions of the Revised Statutes on the same subject, and was obviously intended to be used in the same sense. If we are to hold that disbursements must be

regarded as part of the damages, scarcely a case would occur in which the prevailing party would not recover full costs, and all the salutary provisions of the statute, limiting costs to the amount of the damages recovered, which are so well calculated to check, if not to punish unworthy and malicious litigation, would be entirely annulled.

This idea, that a new signification has been given to the term costs by the Legislature, seems to be founded principally upon the peculiar phraseology of section 811, which directs the clerk how the judgment shall be made up. The clerk is directed to insert in the entry of the judgment on application, &c. "the *sum of the charges for costs* as above provided, and the necessary disbursements and fees of officers as provided by law." That is, the sum by way of indemnity mentioned in section 303, which is fixed by other sections, and is declared to be costs, and the disbursements and fees of officers which were always costs. The new costs provided by the code as a substitute for the attorney's costs, and the other costs of suit as then allowed by law. This seems to me the plain and reasonable interpretation of section 811, and to be in harmony with all the other provisions of the code providing for parties giving security for costs.

It can hardly be supposed that the Legislature, had they intended really to make the change contended for, would have neglected to make some express provision on the subject, and left it be inferred merely from the directions to the clerk as to the manner of entering up the judgment. That section merely substitutes the clerk for the taxing officer and directs him what items he shall insert in the judgment in addition to the damages recovered. "The necessary disbursements and fees of officers as allowed by law," were always allowed by law as costs to the party entitled to recover costs, and should be still so allowed. Amongst the manifold changes of name and form and substance, whether for good or evil, no changes as I conceive has been made or intended in regard to the necessary disbursements and fees of officers, either in name or character. They are still costs.

Much as I regret to add to the list of conflicting decisions in this court, I feel, nevertheless, constrained to dissent from the conclusions of the learned justice to whose decisions we have been cited; because I regard them not only a manifest misinterpretation of the code, but calculated to encourage and foster a species of litigation which it has always been the policy of our laws to repress. We are unanimously of opinion that the disbursements were improperly inserted, and that the motion to strike out must be granted, but without costs. Since making the above decision, our attention has been called to that of Justice BARCULO, in *Belding v. Conklin*, 4 How. Pr. 196, in which we fully concur.

## SUPREME COURT.

OZEM MERRIFIELD vs. HENRY H. COOLEY, impleaded with ESEK C. BRADFORD.

The rules of law in force at the passage of the code, in regard to actions at law, still prevail, and apply to actions under the code which are based upon legal, as distinguished from equitable principles; and in like manner, that those equitable principles which were in force under the old regime, are still applicable to actions founded upon those principles, excepting where the code, in express terms, provides otherwise.—WELLES, Justice.

In an action against several defendants to recover damages for the breach of a contract, that the plaintiff must recover against all the defendants or not at all, unless in one of the excepted cases provided by statute, that is, where the defendants hold different relations to the plaintiff, and where "*a several judgment may be proper*." (Code, § 274.)

Thus, where one defendant moved for a commission to examine a co-defendant under § 397, *held*, that the papers not showing that a several judgment would be proper, a *prima facie* case was not made out for a commission. Motion denied.

*Yates Special Term, January, 1850.*—Motion on behalf of the defendant Cooley, for a commission to take the testimony of defendant Bradford, of the town of Elyria, in the state of Ohio, as a witness for defendant Cooley.

The affidavit upon which the motion is founded is in the usual form to obtain a commission to examine a foreign witness.

GEORGE O. RATHBUN, *for the motion.*

WILLIAM ALLEN, *opposed.*

WELLES, Justice.—The papers do not disclose the nature of the action, nor whether it is a case in which the moving defendant (Cooley) could examine his co-defendant (Bradford) as a witness upon the trial. Generally one of several defendants cannot be a witness for the others in the same suit. The code (§ 397) provides that "a party may be examined on behalf of his co-plaintiff or a co-defendant; but the examination thus taken shall not be used on behalf of the party examined." And whenever, in the case mentioned in sections 390 and 391, one of several plaintiffs or defendants who are joint contractors or are united in interest, is examined by the adverse party, the other of such plaintiffs or defendants may offer themselves as witnesses to the same cause of action or defence, and shall be so received. Sections 390, 391, referred to, provide for a party being examined as a witness at the instance of the adverse party. This motion is founded upon the first branch of the above recited § 397. The residue

of that section is only a further provision in relation to the cases mentioned in sections 890, 891, and do not relate to the case of a party being examined in behalf of his co-party.

What, then, is the true construction of that portion of section 897, upon which the motion is founded? Can a party be examined as a witness for his co-plaintiff or co-defendant *in all cases* of a plurality of such parties, subject only to the qualification that such examination shall be used on behalf of the party examined? Unless this question can be answered in the affirmative, the motion must be denied, as otherwise the party moving has not, in his papers, made out a *prima facie* case.

At common law, where a party brought his action against two or more defendants upon a contract, he must recover against all the defendants or none. (1 Ch. Pl. 84, and cases there cited; *Manahan v. Gibbons and others*, 19 J. R. 109.) Such was the general rule, subject to a few exceptions, such as a bankrupt discharge, &c. of one of the defendants. (1 Chitty Pl. 85, and cases there cited.) The plaintiff was in all cases bound to prove a joint contract with all the defendants.

In actions sounding in tort, the rule was otherwise, and the plaintiff was allowed to recover against one or more of several defendants as the evidence warranted, and the others might be acquitted.

By section 274 of the code, "judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may determine the ultimate rights of the parties on each side, as between themselves. In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper. The court may also dismiss the complaint with costs, in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served."

The general object of this section, I suppose, was to leave the court at liberty to apply the rules which prevailed in the late Court of Chancery, to actions under the code. Having abolished the distinction between actions at law and suits in equity, such a provision or power in the court would become quite necessary to the due administration of justice, in actions founded upon principles of equity. The section also embraces provisions applicable to actions founded upon rules of law, and perhaps to both. For instance, in case of several defendants, a judgment may be rendered against one or more of them, leaving the action to proceed against the others *whenever a several judgment may be proper*.

I think here is a plain recognition of the rule that in actions against several defendants, founded upon legal principles, sounding in contract, the recovery must be against all or none of them, excepting those cases provided by statute, where the defendants hold different relations to the plaintiff, such as maker and endorser of the note upon which the action is brought, and where, in the language of the section, "*a several judgment may be proper.*" It seems to be here pretty clearly implied that in some cases several judgments would not be proper.

I am, therefore, prepared to hold that the rules of law in force at the passage of the code, in regard to actions at law, still prevail, and apply to actions under the code which are based upon legal, as distinguished from equitable principles; and, in like manner, that those equitable principles which were in force under the old regime, are still applicable to actions founded upon those principles, excepting where the code in express terms provides otherwise. That in an action against several defendants to recover damages for the breach of a contract, the plaintiff must recover against all the defendants, or not at all, unless in one of the excepted cases above referred to. That the 397th section of the code was not intended to apply to such a case; and that as the papers on this motion do not show that a several judgment would be proper, a case is not made out where the defendant Bradford could be examined as a witness.

It was contended, on the argument, that the question of the competency of the witness should be left to be determined at the trial; and the counsel cited *Graves v. Delaplaine*, (11 J. R. 200,) in support of that position. That would be so in an ordinary case, because, although the witness might be shown to be incompetent, yet his competency might be restored before he was examined. But I place the denial of the motion upon the ground that a *prima facie* case is not made out; that by the common law, Bradford is not and cannot be made a competent witness for his co-defendant; and if the case is within the exception of any statute, the fact should be shown.

The motion is denied without costs and without prejudice, &c.

## SUPREME COURT.

## RUTH HULBERT vs. THE HOPE MUTUAL INSURANCE COMPANY.

The service of a summons upon a president of a foreign corporation who happens to be temporarily in this state, and who does not voluntarily appear, does not give the court jurisdiction of the defendant (the corporation,) for the purpose of rendering personal judgment upon contracts made in this state, or for debts due to residents of this state. Such a service must be regarded, for all practical purposes, as simply a statutory notice that proceedings are about to be instituted against the defendant's *property*.

An action against a foreign corporation, is now as a *suit* was formerly, a proceeding against its property only, unless there was a voluntary appearance by the defendant. (See Code, sections 227 to 243; 2 R. S. 459, and § 427 of the code.)

It is not required (Code, § 227) that the attachment should accompany the service of the summons. It may be served afterwards.

*Erie Special Term, January, 1850.*—The defendant is a corporation, created by the laws of Connecticut. The only proceeding yet taken in the action, is the issuing and service of a summons. The service was made by delivering a copy to John W. Leeds, in the office of the defendant in the city of New York. Leeds is the president of the company, and resides in Stamford in Connecticut, being temporarily in New York on business, when the service was made. The action is upon a policy of insurance effected upon the life of the late husband of the plaintiff. The contract was made with an agent of the defendant in the city of Buffalo, and the plaintiff resides there.

The affidavit on the part of the plaintiff states that her attorneys were intending to procure the issuing of an attachment in the action; that they had been making inquiries, and procuring the evidence requisite to lay before an officer to get this process; and were about to make an application for it, when the proceedings were stayed to enable the defendant to make this motion. The defendant does not yet appear generally in the cause, but specially for the purpose of making the motion only. The motion is to set aside the summons and proceedings for irregularity, on the ground that the suit is commenced "by the service of summons only."

H. W. ROGERS, *for defendant*.

S. G. HAVEN, *for plaintiff*.

SILL, Justice.—The object of this motion, as stated in the body of the affidavit on the part of the defendant, and by the counsel on the argument, is to interpose an objection to the jurisdiction of the court. The



argument is, that without an attachment and seizure of property, there is no jurisdiction *in rem.* ; and by service of a summons on the president of a foreign corporation, the court does not obtain jurisdiction of the person (so to speak) of the defendant: that although the term of the code would seem to confer jurisdiction by such service, still if such was its design, it is in this respect nugatory.

I find that a notion prevails to a very considerable extent, that it was designed by the amended code, to authorize courts to pronounce judgment *in personam* against a foreign corporation, upon proof of the service of a summons in the manner prescribed in that act. A glance at the former and present practice will show that it is not very extraordinary that such an impression should exist. At common law, before a judgment could be pronounced, the defendant must be in court, either upon its process or by voluntary submission of his person to its jurisdiction ; and a statement that the defendant was in court, was an indispensable requisite in the record of every valid judgment. Down to the time of the adoption of the code, this principle of practice was retained in theory. If the defendant was not in fact in court, in one of the modes above mentioned, then an *authorized* entry of his appearance in its minutes is a pre-requisite in the recovery of a judgment. This entry justified a statement in the record (which could not be controverted) that the defendant was in court. Thus under the former practice, every regularly drawn record contained conclusive evidence that the tribunal, giving the judgment, had jurisdiction of the person of the defendant.

Prior to 1880, it seems to be conceded that in our courts or under our laws, no proceedings could be had against foreign corporations except in cases of voluntary appearance by them. (*In the matter of McQueen*, 16 Johnson, 5.)

The Revised Statutes (Vol. 2, 459, sec. 15, *et. seq.*) authorized proceedings by which *the property* of foreign corporations in this state might be attached and appropriated to the payment of their debts. These proceedings were called *suits* against foreign corporations ; but the absence of any provision authorizing the entry of the appearance of the defendant, except by its own direction (which I have shown to be indispensable to the recovery of judgment *in personam*,) left no ground for supposing that the proceeding, so far as it depended on the statute alone for its validity, was anything more than a proceeding against the property of the corporation in this state, (3 R. S. 2d ed. 754.)

The code dispenses with an appearance in fact, or in theory, in order to obtain a judgment. Proof that a summons has been served, and that

no answer is put in, a specified time having elapsed, authorizes the court to direct the entry of a judgment. The mode of service, when it can be so made, is by the delivery of a copy of the summons personally to the defendant within this state; and in this manner jurisdiction of the defendant, when a natural person or a domestic corporation, is obtained, which all agree is sufficient to a valid personal judgment. But when personal service cannot thus be obtained, the code authorizes a resort to other steps, which it declares to be service of the summons, and which may be taken against a person, natural or artificial, that has never been within the territorial jurisdiction of this state, or under the protection of our laws. The provisions of the code which regulate the entry of judgments for want of answer, upon proof of service of the summons, make no distinction as to the effect of service, whether it is personal or by publication, except, when the service is not personal, the plaintiff is required to make *ex parte* proof of his claim, and to be examined as to payments. The effect of the judgments in either case, so far as they depend upon any express provision in the code, are the same.

A clause of the 6th subdivision of section 135, does permit a defendant, "when publication is ordered and a copy of the summons is not personally served on the defendant, nor received by such defendant," to defend the action after judgment, in certain cases; but this privilege is not extended to absent defendants who receive a copy of the summons out of this state, and the terms of this provision do not in any case limit or qualify the effect of the judgment, unless the defendants shall come in and submit to the jurisdiction of the court. It is not surprising, therefore, that the code should be understood as asserting, and attempting to confer on our courts, jurisdiction of the citizens and corporations of other states, for the purpose of rendering personal judgments upon contracts made in this state, and for debts due to residents of this state.

I shall assume, however, that neither those who framed the code, or those who enacted it, claim for it any such extra-territorial authority, and that an *action* against a foreign corporation, is now, as a *suit* was formerly, a proceeding against its property only in this state, unless there is a voluntary appearance by the defendant. The enquiry, therefore, is whether the service of a summons alone on the president of a foreign corporation, who is found in this state, is authorized by the code when the object of the *action* is to proceed against the defendant's property here.

The law authorizing *suits* against foreign corporations was not changed by the code as originally adopted; but the amendments of 1849 introduced into that act provisions regulating such *actions*, which probably

supersede pre-existing statutes on that subject. (Laws of 1849, chap. 107, p. 142-3; Report of Commissioners on Practice, p. 39; Amended Code, sections 227 to 243; 2 R. S. 459.)

Before 1849, the only mode of proceeding against a foreign corporation was by attachment (1 Howard's Pr. R. 250;) and this process was not accompanied or preceded by a summons, declaration or complaint. (2 R. S. 459, sec. 15.) By the 107th chapter of the laws of 1849, which passed the Legislature before the amendments to the code, the 15th section of the Revised Statutes above cited was so amended as to require a summons and complaint to accompany the attachment.

The amendments to the code followed, which provide that actions may be brought in the Supreme Court against foreign corporations, upon contracts made in this state, and by plaintiffs who are residents of this state (sec. 427,) and that suits in Courts of Record shall be commenced by the service of a summons, (sec. 127.) The summons is to be served on a corporation by delivering a copy thereof to the *president* or other head of the corporation, secretary, cashier, or managing agent thereof; and when *the person to be served* cannot after due diligence be found in this state, and a cause of action is shown to exist, and the defendant is a foreign corporation, an order can be obtained that the service be made by publication and transmission of the summons by mail, and in such cases the service is complete at the expiration of the time prescribed for the publication, (sections 134, 135, 137.) The mode of serving the summons which has been adopted here is the only course that could be pursued under the circumstances of this case. A reference to section 135 will show that an order for publication cannot be had against a defendant, even a foreign corporation, without proving to the officer who is to make the order, that the *person to be served* (not the defendant) cannot, "after due diligence, be found in this state." I think, therefore, that the mode of service which the plaintiff has adopted is, under circumstances like these, contemplated by the code. It is, however, objected that that the practice is irregular, because the summons was not accompanied by an attachment. Chapter 4, of title 7, of the code was introduced as one of the amendments of 1849, and is mainly a transcript from the Revised Statutes, the principal alterations being such as were proper to adapt it to other provisions of the code, and also to extend its application to suits against natural persons, in cases where jurisdiction of the defendant could not be obtained by personal service of a summons in this state. The first section of this chapter, (227) is as follows: "In an action for the recovery of money, against a corporation created by or under the laws of any other state,

government, or country, or against a defendant who is a non-resident of this state, or against a defendant who has absconded or concealed himself as hereinafter mentioned, the plaintiff, at the time of issuing the summons, or at any time after, may have the property of such defendant attached in the manner hereinafter prescribed, as a security for the satisfaction of such judgment as the plaintiff may recover." This section unquestionably contemplates that a summons may be issued before the attachment, and, in connection with the other provisions of the code before referred to, satisfactorily shows that the practice thus far in the case is authorized by law, and regular. The defendant's counsel still objects that the law is nugatory, so far as it attempts to authorize the service of a summons on the president of a foreign corporation in this state; that the president of a corporation, when out of the state where it is located, does not represent the corporate body there, so as to subject it to the jurisdiction of a sovereignty other than that by whose laws it was created. I am not disposed to question the general doctrine, and would admit its application here, if the object of serving the summons was to get jurisdiction of the defendant. But such was not its object. It was a step preliminary to a proceeding against the defendant's property in this state; a step ineffectual for any purpose, unless followed by a warrant of attachment and seizure of property. The summons is not, in such a case, a judicial process; nor is its issue and service in fact (what it is with doubtful propriety called in the code,) the commencement of an action against a foreign corporation, but, for all practical purposes, is simply a statutory notice that proceedings are about to be instituted against its property.

The power of a state to appropriate property within its limits belonging to absent debtors, to the payment of their debts to its citizens, is undoubted. Any law having such an object is therefore valid, if it contains nothing repugnant to the constitution of this state or the United States, or to natural right. The omission of a provision for giving any notice to the debtor, other than that which constructively results from a seizure of the property, it is conceived would not bring the act within the latter objection. I am not aware that the validity of the act of 1880, authorizing suits against foreign corporations, was ever questioned on account of the absence of any provision for notifying the defendant of the proceeding, which was wanting in that statute, until the amendment of 1842. Were this otherwise, however, the mode of giving the notice must be prescribed by the Legislature, and so long as the steps they direct for the purpose are reasonably adequate to the end proposed, they must of course be held legally sufficient. The object is, in such case, actual

notice; and service of it on the head of the corporation, who happens to be temporarily within the state where the property is about to be seized, must be admitted, is an appropriate, practical and effectual method of bringing to the officers of the corporation a speedy knowledge of the proceeding. This objection of the defendant must, therefore, be overruled.

The motion is denied with ten dollars costs.

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## SUPREME COURT.

### THE EXCHANGE BANK vs. GEORGE MONTEATH and others.

It was not intended, by the adoption of the 8th, 9th, 10th and 11th rules, to confine the discovery of documentary evidence to the two cases mentioned in the 8th rule. But all proceedings instituted under § 388 of the code must be governed by its provisions, uncontrolled and unaffected by the rules.

*It seems*, that if a proper case for discovery should be made by *affidavit* instead of a petition (which is required by the R. S.) an order should be granted; and that it is not necessary that the facts should be made to appear by the oath of the party. They may be shown by the oath of any other person. Nor is it necessary for the party to swear that the books, &c. *are not* in his possession or under his control. It is enough for him to show that they *are* in the possession of the adverse party.

*At chambers, Dec. 1849.*—This was an application by the plaintiffs for an order that the defendants give the plaintiffs an inspection and copy, or permission to take a copy of certain books, papers and documents described in the petition, and alleged to be in the possession or under the control of the defendants. The petition states that the books, papers and documents “*are necessary to enable the plaintiffs safely and properly to prepare for trial, and that they contain evidence material to the merits of the action.*” It also alleges that the books, &c. are in the possession, or under the control of the defendants, and then proceeds to set forth the facts in respect to which it is supposed they will furnish material evidence.

The petition is verified by the affidavit of the plaintiffs' attorney, who states that *he believes* the matters set forth in the petition to be true; that he has stated the case to the plaintiffs' counsel, and is advised by him that the discovery sought is necessary, to enable the plaintiffs properly and safely to prepare for trial, and he believes it to be true. He further

states that none of the plaintiffs' officers are in this state, and that the books, &c., are not in the possession or under the control of the plaintiffs, as he is informed and believes.

The defendants produced an affidavit of George Monteath, one of the defendants, stating that the issue was joined in January, 1849, and that the action has been noticed for trial at several circuits since, and is now noticed for trial at a circuit to be held in Albany on the first Monday of December; that the drafts sought to be recovered in this action were fraudulently made and loaned to the Canal Bank, shortly prior to its failure, by Thaddeus Joy, who was then an agent of the defendants, and without their knowledge or authority, and that the facts were concealed from the defendants, until after the failure of the bank; that the books were kept by Joy, and, up to the time of his resignation, most of them were so kept by him that none of the defendants had access to them, or any knowledge of their contents; that he, the deponent, is now the defendants' agent, and has the entire charge of their affairs, and that he has not in his possession or under his control all the books, &c., specified in the petition.

M. T. REYNOLDS, *for plaintiffs*.

P. CAGGER and J. K. PORTER, *for defendants*.

HARRIS, Justice.—I had supposed that the 388th section of the code was intended to embrace, and did, in fact, embrace every case in which a party should have the right to claim from his adversary a discovery of documentary evidence. It authorizes a discovery of any books, papers, and documents in the possession or under the control of the adverse party containing evidence relating to the merits of the action or the defence therein. The order may be made at any time after the commencement of the action. I cannot conceive of a case proper for a discovery in which it would not be authorized by this section. But some of the judges who met at the general session of the court, held in August last, thought otherwise. Hence the 8th, 9th, 10th and 11th rules were adopted, with a view to provide for a discovery in cases where it should be needed to enable the party seeking it, properly to frame his pleadings under the still unrepealed provisions of the Revised Statutes. It certainly was not intended by the adoption of those rules, to confine the discovery of documentary evidence to the two cases mentioned in the 8th rule. On the contrary, I understand it was intended to leave all proceedings instituted under the 388th section of the code to be governed by its provisions, uncontrolled and unaffected by the rules. Such, at any rate, is the case. If, therefore,

the plaintiffs have presented a case which, by the provisions of the code, entitles them to a discovery, the rules cannot operate to deprive them of their right. Under the Revised Statutes the party seeking a discovery must proceed by petition; but I suppose that, under the code, if a proper case for a discovery should be made, by affidavit, the court or judge should make the order. All that is required is, that it should be made satisfactorily to appear that the party against whom the application is made, has in his possession, or under his control, books, papers, or documents, "containing evidence relating to the merits of the action, or the defence therein." Upon showing this, if, after *due notice* to the adverse party, no good cause be shown against it, the party making the application is entitled to his order for an inspection and copy, or permission to take a copy. I do not deem it necessary that the facts should be made to appear by the oath of the party: they may be shown by the oath of any other person. Nor is it necessary in such an application, for the party to swear that the books, &c., *are not* in his possession or under his control. It is enough for him to show, what the statute requires, that they *are* in the possession, or under the control of the adverse party; and in this respect, it is sufficient if he shows a state of facts, which satisfies the court or officer that the party, against whom the application is made, has the ability to comply with the order for a discovery. It is true, that the application is addressed to the discretion of the court or judge; but in the exercise of that discretion, no officer would feel himself justified in withholding an order for a discovery, when satisfied that the application is made in good faith; that the party against whom it is made has the ability to comply with the order, and that the books, &c., of which a discovery is sought, contain material evidence. Guided by these principles, I have no doubt of the plaintiffs' right to an inspection of the books, papers and documents mentioned in their petition. I shall, therefore, direct that within three days after service of a copy of the order, the defendants give to the plaintiffs the inspection for which they ask, with permission to take a copy of so much of the books, papers and documents, as relate to the merits of the action.

## SUPREME COURT.

## THOMAS CHADWICK vs. HENRY BROTHER.

Section 315 of the code reads as follows: "Costs may be allowed on a motion in the discretion of the court, not exceeding ten dollars." To entitle a party to costs under this section, they must be given *in the order* upon the motion, and the amount must be fixed by the court, not exceeding \$10.

So held, where costs were charged in the general costs of the cause, \$10 on motion to procure commission, and \$10 on motion to procure order to examine a witness under section 354 of the first code, which were stricken out; they not being inserted in the respective orders.

*Double costs*, under the statute, may be allowed to a sheriff, sued as such (under the code,) where he succeeds in the suit. (This decision is adverse to the one in *Hallenbeck v. Miller*, *ante*, page 239, and concurs in the one in *Murray v. Haskins*, *ante*, page 263.)

*Steuben Special Term, October, 1849.*—Motion on the part of plaintiff for re-adjustment of costs, or for such other relief, &c.

The action was commenced under the Code of Procedure of 1848. The defendant was sheriff of the county of Steuben, and the action was brought against him for acts done as such sheriff through one of his deputies, in levying upon and selling certain personal property. Issue in fact was joined 30th January, 1849. On the 13th day of February, 1849, an order was granted on behalf of the defendant for the examination of L. F. Bigelow, a witness, before a referee. It is understood that this order was obtained under § 354 of the first code. On the 5th day of March, 1849, a commission was obtained to examine witnesses in the state of Pennsylvania, on the part of the defendant. On the same 5th day of March, 1849, an order was granted that plaintiff file security for costs in forty days, on the ground of his being a non-resident of the state, &c.

At a special term held in Bath, Steuben county, on the 7th day of June, 1849, an order was duly granted that unless the plaintiff file security for costs in twenty days, and pay \$10 costs of motion, judgment of discontinuance should be entered with \$10 costs of motion. No security being filed in pursuance of the last order, on the 20th July, 1849, the defendant's attorneys, residing in Oxford, Chenango county, served by mail, post paid, on the plaintiff's attorney, residing at Corning, Steuben county, a copy of the defendant's costs in the action, with notice of adjustment before the clerk of Steuben county, at his office in Bath, on the 26th day of July, 1849, at 10, A. M. The mail leaves Oxford for Corning daily, except Sundays, and reaches Corning ordinarily in two days from the time it leaves Oxford. The costs were adjusted by the clerk accordingly on the 26th day of July, no one ap-



pearing on behalf of the plaintiff, at \$66.51 3-4. The copy costs and notice of adjustment were not received by the plaintiff's attorney, at Corning, until the 27th July, and did not arrive at the post office at the latter place until the day previous, after 9 o'clock, P. M. On the said 27th July, plaintiff's attorney wrote to the defendant's attorneys, informing them that he did not receive the copy costs and notice of adjustment until that day, and requested them to consent to a re-adjustment, &c. or to consent to strike out of said costs the two items of \$10 each, and the item of \$22.17 1-4, hereinafter mentioned; and received an answer in substance, declining a compliance with such request. The bill of costs contains the three following items, which are the same the plaintiff's attorney, in his letter to the defendant's attorneys, requested to have stricken out, viz:

|                                                                                                                                                  |             |
|--------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| "Costs on motion to procure commission,                                                                                                          | \$10.00     |
| "Costs on motion to procure order to examine L. F. Bigelow,                                                                                      | 10.00       |
| (These, with the other items in the bill, amounted to \$44.84 1-2.                                                                               |             |
| Then followed the other item in dispute, as follows:)                                                                                            |             |
| "To which add one-half, the defendant being entitled to double costs, being prosecuted in this action for acts done by him as a public officer." | \$22.17 1-4 |

GEO. T. SPENCER, *for plaintiff.*

WM. IRVINE, *for defendant.*

WELLES, Justice.—The defendant's attorneys were regular in procuring the adjustment of the costs. The papers were mailed at Oxford, post paid, on the 20th July; and the costs were to be, and were, adjusted on the 26th. The code (§ 311) requires but two days' notice. Mail service requires double time (§ 412) which, in this case, would have been good if the papers had been mailed on or before the 22d July. The regularity of the defendant's proceeding does not depend upon whether he is entitled to double costs, which are never allowed under the statute, by virtue of which they are here claimed, except on application to the court (Gr. Pr., 2d. ed. 733; 4 Wend. R. 216,) any more than upon the question whether any other item is properly charged. The defendant claimed that he gave the notice the law required; they were not objected to, and the clerk allowed them.

But I think under the circumstances of this case, the plaintiff should be relieved upon terms, provided there is any error in the costs as adjusted.

First, as to the two items of \$10 each, objected to. Neither of the orders for the examination of the witness or for a commission, gave either party

costs. Under the former practice, the party who ultimately should prevail and be entitled to recover costs generally against the other, would be entitled to charge the costs of the motion in his bill. Such costs would abide the final event of the action.

But the difficulty under the code is, that no provision is anywhere made for motion costs, excepting in section 315. This section is as follows: "Costs may be allowed on a motion in the discretion of the court, not exceeding ten dollars." To entitle a party to costs under that section, they must be given in the order made upon the motion, and the amount must be fixed by the court at \$10, or less. They are not regarded as a part of the general costs in the cause, and their collection does not depend upon the ultimate decision of the cause. I think, in this case, they were improperly allowed.

Second, as to double costs. The 303d section of the code repeals all statutes establishing or regulating the costs or fees of attorneys, solicitors or counsel in civil actions, and provides for the allowance to the prevailing party upon the judgment certain sums by way of indemnity for his expenses in the action, which are termed costs. Then follows a number of sections declaring in what cases costs shall be, or may be allowed, and fixing the allowance or tariff in each case. No provision is anywhere made in the code for doubling the costs, nor for any increase beyond the specific allowances, excepting in sections 308 and 309, which do not contemplate a case like the present.

The Revised Statutes (2 vol., p, 617, § 24,) allows the defendant to recover his taxed costs, and one-half thereof in addition, in certain cases therein mentioned. The present is one of those cases. It is an action against a public officer, elected by the people, for an act done by virtue of his office.

The next section provides that "when double or treble costs shall be awarded to any defendant, the same shall be deemed to belong to such defendant," &c.

The question is whether these provisions of the Revised Statutes are repealed by the code. I think they are not. They do not touch the question in what cases costs shall be recovered, nor the amount to be recovered in any particular case. The provision is for cases where the defendant recovers costs, whatever the amount or rate of costs may be, (which is left to be regulated by other statutes;) then the defendant shall recover one-half in addition to his taxed costs. Besides, the section of the code referred to, only repeals all statutes establishing or regulating the costs and fees of *attorneys, solicitors and counsel*, leaving

the disbursements to stand as regulated by other statutes, which sometimes amount to the largest half of the bill.

Again, the additional one-half of the bill is given by the Revised Statutes to *the party*, and not to the *attorney, solicitor or counsel*. The amount of their costs, with the disbursements, are only important in this connection, in order to ascertain what the defendant shall be entitled to beyond what he has to pay as taxable costs. And, finally, there is the same reason for allowing double costs in the cases specified in actions commenced under the code, as in those commenced before.

Let an order be entered that on payment of ten dollars costs of this motion, the clerk of Steuben county re-adjust the costs, unless the defendant will stipulate to deduct \$20 from the single bill as adjusted, and to reduce the item of \$22.17 1-4 so that it shall amount to one-half of the single bill after the said \$20 are deducted, and to amend the judgment accordingly; and in case of a re-adjustment by the clerk, he deduct the item of ten dollars charged as "costs on motion to procure commission," and the item for the like sum charged as "costs on motion to procure order to examine L. F. Bigelow," and also that he reduce the item of \$22.17 1-4 so as to amount to one-half of the single bill as re-adjusted.

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## SUPREME COURT.

### JOHN SMITH and others vs. HOMER CASWELL.

A *case* cannot be turned into a *bill of exceptions* or *special verdict*, after judgment of the Supreme Court upon it, without a stipulation to that effect at the trial, or its being made a part of the order or entry of the verdict.

So held, where the verdict was taken subject to the opinion of the court upon a case to be made, and judgment for defendant ordered thereon at the general term; no such stipulation or reservation having been made at the trial.

*Oneida Special Term, February, 1850.*

G. B. JUDD, *for plaintiff.*

F. KERNAN, *for defendant.*

GRIDLEY, Justice.—This cause was tried at a circuit held in Herkimer county; and on the trial, a verdict was taken subject to the opinion of the court on a case to be made. The court having at the last general term ordered judgment for the defendant, the plaintiff now moves for leave to

turn the case into a bill of exceptions, for the purpose of reviewing the judgment of the Supreme Court in the Court of Appeals.

It appears that no stipulation was entered into by the parties that this right should be reserved ; nor did it make a part of the order or entry of the verdict. The question, therefore, is, whether the court, in such a case, has the power to order this to be done against the will of the prevailing party.

The mode of disposing of the cause at the circuit by a verdict subject to the opinion of the court, was adopted by the consent of the parties ; and had either party desired to retain the right now claimed, it would have been made a part of the order or entry of the verdict ; but no such request having been made, it must be taken that both parties consented that the Supreme Court should dispose both of the question of law and fact. It is said, that in preparing the case, the plaintiff's attorney proposed to have the case signed and sealed by the judge. That may be ; but the idea of signing and sealing a *case* was not in accordance with any existing practice, and, therefore, the case was settled in the ordinary manner.

The cases are uniform that the court has no power to grant the relief sought under circumstances like the present. In *Woolsey v. Camp*, (8 Cowen, 358,) it was held that a case could not be turned into a *special verdict* without a stipulation to that effect at the trial. In *Stewart v. Hawley*, (22 Wendell, 561,) the court decided that where exceptions were actually taken on the trial and inserted in a case, without a stipulation, it was too late to ask to turn the case into a bill of exceptions after judgment of the Supreme Court. The learned Judge who delivered the opinion of the court, after saying that he had felt a desire to relieve the plaintiff if possible, closes an elaborate opinion in these words : "*I am satisfied, however, for the reasons mentioned, that I cannot put the cause in its way to that court, (Court of Errors,) consistently with either the statute or the principles of sound practice.*" In *Masters v. Bailey*, (1 Howard's Sp. T. Rep. p. 42,) this question was again decided in the same manner, even where the party was mistaken in his opinion of his rights, and had proceeded on the supposition that he would have the right, as a matter of course, to turn the case into a bill. The court, however, held the rule to be inexorable, and denied the motion.

I am, therefore, bound, by the authority of these cases, to deny this motion. To depart from these decisions, would be to bend the law to meet the exigency of a particular case.

The result is, that the motion must be denied with costs.

## SUPREME COURT.

BURKLE vs. ELLS et al.

A defendant is not entitled to be discharged from arrest upon a *ca. sa.* issued upon a judgment founded upon a recovery against him as a common carrier, in an action on the case for negligence.

A breach of the duty of a common carrier is a breach of the law, for which an action lies, founded on the common law, and which wants not the aid of a contract to support it.

Although an action of assumpsit will lie in such a case, upon an implied contract, yet, in an action on the case founded on the breach of the law, it must be regarded as sounding in tort.

*Oneida Special Term, Dec. 1849.*—Motion to discharge the defendant from a *ca. sa.*

CHAS. H. DOOLITTLE, *for the motion.*

F. KERNAN, *opposed.*

GRIDLEY, Justice.—The ground on which the defendant asks for his discharge from the execution, is that the judgment against him is founded upon contract, and that he is, therefore exempt from arrest or imprisonment upon it, under the first section of the act to abolish imprisonment for debt and to punish fraudulent debtors, (Laws of 1831, p. 396.) That act provides “that no person shall be arrested or imprisoned, on any civil process issuing out of any court of law, &c., in any suit or proceeding instituted for the recovery of any money due on any judgment founded upon contract, or due upon any contract, express or implied, or for the recovery of any damages for the non-performance of any contract.” If this judgment, therefore, was founded on *contract*, the defendant is entitled to be discharged; otherwise not.

In *Brown v. Treat* (1 Hill, 225,) it was held by COWEN, J., that a defendant was entitled to be discharged, in a cause where there was a recovery on a declaration containing two counts in assumpsit, one in case for negligence and one in trover. It was indeed *said* in the opinion, that where an action on contract would lie, although an action of tort would also lie, and a judgment had actually been recovered in tort, the defendant would be entitled to his discharge. But that part of the opinion was expressly overruled in *Suydam v. Smith*, (7 Hill, 182;) and the decision itself was disapproved in (7th Hill, 578,) in the case of *McDuffie v. Beddoe*. We come back, therefore, to the question whether the judgment was founded upon contract or not.

The recovery was had against the defendant as a common carrier, for the loss of a quantity of flour. The action in such a case will lie on the implied contract, or in case, on the custom of the realm founded on the duty which the law imposes upon the party in consequence of the nature of his employment. When the action is brought on the latter ground, the recovery is not founded on a contract, and it is not necessary that any contract should be proved, or any consideration paid, or agreed to be paid. (See 3 Wendell, 167; 3 Brod. & Bing. 54; *Coggs v. Bernard*, 2 Lord Raymond, 909.) If he undertake to carry gratuitously, he is, notwithstanding, liable in case for negligence. The declaration in this case, as will appear by a comparison of it with the precedents, (2 Ch. Pl. 155 and 320,) is founded, not on the contract, but on the custom of the realm and the duty of the carrier. The grievance is averred to be the "*carelessness, negligence and improper conduct*" of the defendant, and positive negligence was proved on the taking of the inquisition as appears by the affidavit of one of the jurors. In just such a case as this, the Supreme Court held, not only the *form*, but the *cause* of action to be *in tort*. In the 3d Wendell, 158, *Bank of Orange v. Brown and others*,) there was a plea of abatement to a declaration like the one under consideration, on the ground that there were fifty other proprietors of the steamboat who should have been made defendants. Now, if the action had been founded on contract, all the owners of the boat should have been made parties; but if the action sounded *in tort*, then the plaintiff might sue all or any number of the tort feorsors at his election. Upon a demurrer to the plea, the court held the action to be *in tort*, and not in contract, and sustained the demurrer. In an able and elaborate opinion, Chief Justice Savage maintains that *the cause of action was in tort* as well as the *form*. Among others, the Chief Justice reviews the case of *Bretherton v. Wood*, (3 Brod. & Bing. 54,) in which Dallas, Ch. J. of the Common Pleas, in delivering the judgment in the Court of Exchequer Chamber, holds this language: "This action is on the case against a common carrier upon whom a duty is imposed by the custom of the realm; or, in other words, by the common law. A breach of this duty is a breach of law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it." He admits that *assumpsit* would lie, but regarded the action founded on a breach of the law, and sounding *in tort*.

This view of this case is decisive against the defendant, and the motion must be denied with costs.

## SUPREME COURT.

JOSEPH R. ENOS and others agt. EDWIN THOMAS and others.

A motion may be made to refer a cause under § 270 of the Code, immediately on receiving a reply to the answer, and the party is not bound to wait twenty days to see if the defendant will amend his answer.

*Saratoga Special Term, Sept. 1849.*

WILLARD, Justice.—An issue of fact was joined on the 8th August, by the service of the reply to the defendants' answer. It was therefore regular to move to refer the cause. (§ 270 of the Code.) It is no objection that the defendant's time within which he might amend his answer by § 172 had not expired when the notice was served. It does not appear that he has since amended. The party is not bound to wait, before making the motion, to see whether the pleadings will be amended. He has a right to act upon them as they are served. A subsequent amendment cannot defeat a motion for a reference, unless by such amendment there ceases to be an issue either of fact or law between the parties.

The motion to refer must be granted to Wm. A. Beach, who is agreed upon as the referee in case the court grant the motion.

## SUPREME COURT.

ANONYMOUS.

*Albany Special Term, October, 1849.*—Action for the recovery of the possession of personal property.

Motion to set aside the jurat to the complaint, the affidavit accompanying the notice to the sheriff of the claim of property, and the undertaking of the sureties, for irregularity, on the ground that the complaint and affidavit were sworn to before the *plaintiff's attorney*, and that the undertaking was not *proved or acknowledged* by the sureties.

A. J. COLVIN, *for motion.*

D. McMARTIN, *opposed.*

HAND, Justice, granted the motion, with costs, but gave the plaintiff leave, *nunc pro tunc*, to file a new complaint duly verified, and a new affidavit; and an undertaking duly proved and acknowledged, within twenty days, &c.

## COURT OF APPEALS.

*Decisions—January Term, 1848—at the Capitol in the city of Albany.*

MELANCTHON W. DANKS, plaintiff in error, vs. JEREMIAH D. QUACKENBUSH, defendant in error.—*Judgment affirmed.* A. TABER, for plaintiff in error; GEORGE F. COMSTOCK, for defendant in error.

The decision in this case affirmed (by an equal division of the judges,) the decision of the Supreme Court, declaring the unconstitutionality of the act of April 11, 1842, extending the exemption of personal property, as to debts contracted before its passage. (Reported, 1 Comstock, 129.)

JOHN FRAZER and others, appellants, vs. HENRY M. WESTERN and others, respondents.—*Decree affirmed.* S. P. STAPLES and GEORGE WOOD, for appellants; CHARLES O'CONOR, for respondents.

This was a bill filed in chancery to set aside an alleged fraudulent voluntary trust deed, given by the husband to a third person, in trust for his wife. The question was, whether Western, who purchased from the wife, according to the conditions and terms of the deed could claim as a *bona fide* purchaser, and be protected. Whether he was bound by the knowledge of the deed being voluntary, to have inquired into the situation of the grantor (who was alleged to have been insolvent,) at the time of its execution. (Reported, 1 Barb. Ch. R. 220.)

JOSEPH BOUCHAUD, ex'r, &c., appellant, vs. JOSEPH LOPEZ DIAS and another, respondents.—*Decree of the Chancellor and Vice-Chancellor reversed and bill dismissed with costs in the Court of Chancery.* EDWARD SANDFORD, for the appellant; JOHN L. MASON and B. F. BUTLER, for respondents.

This case involved the question of the priority of claim of the United States, under an act of Congress, to payment where the insolvent debtor assigned for the benefit of a single creditor, and not for the benefit of creditors generally. (Reported, 1 Comstock, 201.)

CHRISTIAN J. BURCKLE and others, executors, &c., plaintiffs in error, vs. STEPHEN LUCE, defendant in error.—*Judgment affirmed.* This cause was submitted upon printed arguments and points.

This case decided that on the death of a plaintiff, in replevin, the suit abates and cannot be revived by *sci. fa.* The defendant has no remedy in such case upon the replevin bond. (Reported, 6 Hill, 558.)

JAMES T. BRADY, appellant, vs. JOHN ANDREW MCCOSKER, an infant, &c., respondent.—*Decree affirmed.* EDWARD SANDFORD, for appellant; CHARLES O'CONOR, for respondent.



This was a case arising upon special demurrer to a bill filed to set aside a will of real estate, on the ground of fraud, &c. Several questions were decided in relation to objections raised to the jurisdiction of a Court of Equity to set aside a will of real estate on the ground of fraud, or incompetency; and various impediments which existed to an action at law, stated, which would give jurisdiction to a court of equity. (Reported, 1 Comstock, 214.)

EDMUND CHARLES, impleaded, &c., plaintiff in error, vs. THE PEOPLE, defendants in error.—*Judgment affirmed.* C. C. EGAN, for plaintiff in error; JOHN McKEON, for People.

In this case it was held, that under the Revised Statutes (1 R. S. 665, § 28,) it was a misdemeanor to publish in this state an account of a lottery to be drawn in another state, where it may be authorized. (Reported, 1 Comstock, 180.)

GOETHILF MOEHRING, appellant, vs. JAMES S. THAYER, public administrator of the city of New York, and administrator of Joseph Leo Wolf, deceased, respondent.—*Decree affirmed.* DANIEL LORD and GEO. WOOD, for appellant; D. DUDLEY FIELD, for respondent.

This was a case where the chancellor affirmed the decree of the surrogate of New York, refusing to admit to probate an instrument purporting as a will of personal property by Isabella Leo Wolf. The paper purported to be executed by her in the lifetime of her husband, with his consent; and to dispose of the proceeds of a policy of insurance on his life, taken out in her name (under the act of 1840,) and made payable to her, or in case she died before her husband, to her children. Mr. Leo Wolf, his wife and only child, perished in the steamer President. The grounds of the chancellor's decision were, that since the Revised States, a married woman has no power to make a will of personal property, and that Mrs. Leo Wolf, not having survived her husband, never had any interest in the insurance money. (Reported, 1 Barb. Ch. R. 268.)

EVERITT JUDSON, plaintiff in error, vs. JEHIEL HOUGHTON, defendant in error.—*Judgment affirmed.* R. W. PECKHAM, for plaintiff in error; N. HILL, Jr., for defendant in error.

This was an action of debt upon a Justice's Court *adjournment bond*. Judson was plaintiff, and Jehiel Houghton and Harvey Houghton were the defendants in the Justice's Court. The summons was not served on Harvey Houghton, and he did not appear in the suit. The justice rendered a judgment upon the verdict of the jury against Judson, for costs. The Common Pleas, on *certiorari*, reversed the judgment of the justice.

The Supreme Court reversed the judgment of the Common Pleas and affirmed that of the justice. This court affirmed the latter judgment.

An execution was issued on the judgment rendered in the suit mentioned in the adjournment bond, in which Judson was plaintiff and Harvey Houghton was defendant; and returned *nulla bona*. Two breaches of the condition of the adjournment bond were attempted to be established by the plaintiff on the trial; one by the sale by H. Houghton of a ton of hay, and the other an assignment of a mortgage given by H. Houghton to J. Houghton. It was a question of the proper admissibility of evidence to prove these breaches. (Not reported.)

SAMUEL HYMANN, plaintiff in error, vs. LEVI COOK and others, defendants in error.—*Judgment affirmed*. P. J. JOACHIMSSSEN for plaintiff in error; CHARLES O'CONOR for defendant in error.

This was an action of replevin brought by Hymann against Cook and others in the New York Common Pleas, for taking nine casks horn tips. On the trial the plaintiff was non-suited, on the ground that there was no evidence of a wrongful taking, but at most only of a wrongful detention of the goods, and a return was ordered to the defendants. Plaintiff excepted. Hymann brought error to the Supreme Court. The defendants pleaded to the assignment of errors in bar, that the writ of error was not brought within two years, &c. Plaintiff replied infancy, and that he brought the writ within two years after majority, &c. Defendants rejoined, taking issue upon plaintiff's allegation, in his replication. The issue of fact thus joined, was tried at the circuit, and a verdict was found in favor of the plaintiff. The plaintiff then, (January term, 1846,) moved the Supreme Court, upon the trial record, for a rule reversing the judgment of the Common Pleas, as a matter of course. The court held that they could not reverse the judgment without looking into the record to see if there was any error. (Reported 2 Denio, 201.) In October term, 1846, the Supreme Court affirmed the judgment upon the whole record. This court affirmed that judgment. (Not reported.)

JAMES McKEON, plaintiff in error, vs. RICHARD GRAVES and ELI BEST, defendants in error.—*Judgment affirmed*. J. H. REYNOLDS for plaintiff in error; GEO. W. BUCKLEY for defendant in error.

The question decided in this case was, that *trespass quare clausum fregit*, although a local action originally brought in the Supreme Court and Common Pleas, might be brought in a Justice's Court of a different county from that in which the land lay; and the Common Pleas, on *certiorari*, had jurisdiction. (Reported, 2 Denio, 639.)

JOHN T. STAGG, executor, &c., appellant, vs. JAMES JACKSON and MARY E., his wife, respondents—*Decree affirmed with costs to be paid by the appellant personally.* H. E. DAVIES for appellant; L. B. WOODRUFF for respondents.

This was a case of a will of real and personal estate, devised to executors in trust to sell, lease and pay over the rents, &c.; *held*, that the executors could be compelled to account before the surrogate for the rents and profits, of the real as well as for the personal estate. (Reported, 1 Comstock, 206.)

C. FLINT SPEAR and GEORGE B. RIPLEY, appellants, vs. CHARLES WARDELL and others, respondents.—*Decree of the Chancellor reversed, and decree declaring that Henry B. Wardell holds the assigned property as trustee for the complainants to the extent of their debt, and that he pay the same, together with their costs in the Court of Chancery out of the funds in his hands.* S. P. NASH for appellants; J. S. BOSWORTH for respondents.

In this case it was held that a *voluntary* assignment by a debtor, of all his property for the benefit of his creditors generally, while proceedings were pending against him by a judgment creditor under the *statute of 1831*, (non-imprisonment act,) was a fraud upon the rights of the prosecuting creditor. The assignment was for the benefit of the prosecuting creditor—not of the creditors generally. (Reported, 1 Comstock, 144.)

DAVID MEAD, plaintiff in error, vs. JAMES LAWSON, defendant in error.—*Judgment affirmed.* H. G. WHEATON for plaintiff in error; R. W. PECKHAM for defendant in error.

This was a case involving the construction of a contract or agreement in writing to convey a piece of land. The description of the premises was thus described: "witnesseth, that the said David Mead hath this day sold a certain piece of land, situate in said town, supposed to contain about six or eight acres of land, *commencing at John Mead's line, at a stone marked J. L., from thence easterly to Henry Keefer's line*, and said James promises, &c." On the trial in the Common Pleas extrinsic testimony was offered and allowed to prove the location and general boundaries of the premises. The Supreme Court, NELSON, Ch. J., held that the contract was void for uncertainty in the description of the premises. That the description of premises to which any effect can be given, must be either perfectly certain of itself or capable of being made so by a reference to something extrinsic in the contract, (13 J. R. 300.) That the parties knew the localities or parcel contracted for, is nothing; the

question is whether they had sufficiently described it in the written instrument, which is alone the only competent evidence of their object and intent in the matter. The judgment of the Common Pleas was reversed, and a *venire de novo* ordered. (Not reported.)

GEORGE CORNES, plaintiff in error, vs. OLIVER HARRIS, defendant in error.—*Judgment affirmed.* WM. TRACY for plaintiff in error; C. P. KIRKLAND for defendant in error.

This was a case in relation to the action of nuisance, by writ of nuisance, under 2 R. S. 332. It was held that the declaration in such an action must show that the plaintiff has a freehold estate in the premises affected by the nuisance. *Possession* of the premises affected by the nuisance is sufficient to sustain an action on the case for damages arising from the nuisance. (Reported, 1 Comstock, 223.)

ISAAC BELL, appellant, vs. EDWARD STAINER, respondent.—*Decree of the Court of Chancery and also that of the assistant vice chancellor reversed, and the bill dismissed with costs in the Court of Chancery.* A. G. ROGERS and SAMUEL STEVENS for appellant; N. DANE ELLINGWOOD for respondent.

Stainer filed his bill to set aside a bond and mortgage given by him to J. H. Bell, and assigned by the latter to his father, Isaac Bell, the appellant, on the ground of fraud. The material question in the case was, whether J. H. Bell was guilty of a fraud in the sale of lots in Sandusky city, for which the bond and mortgage were given. The bill charged that J. H. Bell never had any legal or equitable title to the lots, except a contract as a conditional sale from the owner, but that he pretended to be the owner with intent to defraud, &c. The answer denied that J. H. Bell pretended to be the owner of the Sandusky lots, when he sold them to Stainer, or that he concealed from him the fact that he, Bell, had no claim to them, except under an executory contract for their conveyance, conditionally thereafter to be performed. It was a question of fraud. (Not reported.)

SAMUEL ADAMS, plaintiff in error, vs. THE PEOPLE, defendants in error.—*Judgment affirmed.* GEORGE WOOD and J. H. RAYMOND for plaintiff in error; OGDEN HOFFMAN and J. McKEON for defendants in error.

This case decided that an offence committed within this state by means of an innocent agent, the employer was guilty as a principal though he did no act in this state, and was at the time the offence was committed, in another state. It was no answer to the indictment that the defendant owed allegiance to another state or sovereignty. (Reported, 1 Comstock, 173.)

SAMUEL CODDINGTON, plaintiff in error, vs. CHARLES A. DAVIS and others, defendants in error.—*Judgment affirmed.* S. STEVENS and L. LIVINGSTON for plaintiff in error; CHARLES O'CONOR for defendants in error.

This was a case involving the question of a legal *protest*; what is meant by the term "*protest*" in its technical and general signification; also the construction of two written instruments, &c. (Reported, 1 Comstock, 186.)

CHARLES PARTRIDGE, appellant, vs. WILLIAM MENCK and others, respondents.—*Order affirmed.* A. H. DANA for appellant; E. H. OWEN for respondents.

This was an appeal from an order of the chancellor affirming an order of the vice chancellor of the 1st circuit, dissolving an injunction.

This case involved the question of the pirating of trade marks, and the power of the Court of Chancery to interfere by injunction to prevent such pirating. (Reported, 2 Barb. Ch. R. 101.)

## SUPREME COURT.

JOB D. TANNER et al., agt. JACOB R. HALLENBECK, Sheriff of  
Columbia.

In an action against the sheriff for the escape of a judgment debtor, committed on a *ca. sa.*, it is no defence to the sheriff that such debtor, after the escape, and before the commencement of the action against the sheriff, departed this life.

The cause of action is complete when the escape takes place, liable, however, to be defeated by the voluntary return of the judgment debtor before suit brought.

Such voluntary return is matter of defence, and the sheriff takes the risk of the death of the debtor.

*Columbia Special Term, Oct. 1849.*—This is an action commenced, under the code of 1848, against the defendant as sheriff of Columbia county, for the escape of one Frederick Curtis. The complaint sets out the recovery of a judgment by the plaintiffs in the Columbia County Court, on the 14th November 1848, in favor of the plaintiffs, against the said Curtis for \$51.96; that on the 25th November 1848, a *ca. sa.* was issued thereon, under which Curtis was arrested and imprisoned by the defendant until the 14th February, 1849, when the defendant wrongfully, and against the will of the plaintiffs, suffered the said Curtis to escape, &c.; wherefore the plaintiffs demand judgment for \$51.96.

The defendant's answer does not put in issue the judgment, execution, and imprisonment of Curtis, but in effect admits them. It sets out that Curtis, after his commitment, was admitted to the liberty of the jail limits, and that afterwards, without the knowledge, permission or consent of the defendant, the said Curtis, on the 13th February, 1849, escaped from the said limits, and on the 17th February, 1849, that the said Curtis departed this life, before the commencement of this action. It was conceded that the action was commenced by the plaintiffs against the sheriff on the 17th February, 1849, in the afternoon, and that in the forenoon in the same day, the said Curtis died at his residence, ten or twelve miles from the jail, not having returned to the limits after his said escape on the 18th February, 1849.

JOHN SNYDER, *for the defendant*, contends that the action will not lie, as the original defendant was dead before the suit was brought.

K. MILLER, *contra*.

WILLARD, Justice.—As the escape in this case was without the consent of the plaintiffs, their cause of action was complete the moment the escape occurred; liable, however, to be defeated by the voluntary return of the

prisoner, or by his re-capture by the sheriff before suit brought. The rule is laid down in Bacon's Abridgement, 529, tit. Execution, that if a prisoner in execution escape, without the assent of the sheriff, and he make fresh pursuit, and re-take him before action brought, it shall excuse the sheriff; and that a voluntary return of the prisoner, before action, is equal to a re-taking on fresh pursuit. This doctrine has been repeatedly sanctioned by this court, (6 Cowen 732; *Tillman v. Lansing*, 4 J. R. 45; *Barry v. Mandell*, 10 J. R. 563.) As the re-capture of the prisoner, or his voluntary return are matters of defence for the sheriff, he necessarily takes the risk of the death of the defendant in the execution, before suit, re-capture or return. The cause of action occurred the moment the escape took place, (See *Sweet v. Palmer*, 16 J. R. 181; *Scott v. Peacock*, 1 Salk. 271.) Nothing short of a release or an accord and satisfaction could discharge it. The death of the original defendant had no other effect than to prevent the sheriff from re-taking him before suit brought. It did not prejudice the plaintiffs' right of recovery.

There must, therefore, be judgment for the plaintiffs against the defendant for the amount of the judgment, together with the costs, &c.

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## SUPREME COURT.

### JEHIEL JUDD vs. ROBERT FULTON, Sheriff of Greene County.

In computing statute time, the first day, or the day on which the time begins to run, is to be excluded.

Where an act is to be done *within* a given time—a. g. thirty days—the party has all of the thirtieth day to perform it. But if it is to be done *after* the expiration of the thirty days, it cannot be performed till on the thirty-first day. The law takes no notice of fractions of a day.

Under 2 Rev. Stat. 252, a party may be discharged from imprisonment on making the requisite affidavit, "after he shall have remained in prison thirty days." Held, where a defendant was committed to prison on the 25th of August, he could not be discharged before the 26th of September.

*Argued February Term, 1850, before Justices WATSON, PARKER and WRIGHT.*—This suit was brought against the defendant to recover for the alleged escape from the jail limits of one Eli Hubbard, confined on an execution issued by a justice of the peace. Hubbard was committed on 26th August, 1847: on the 25th September he made the affidavit required by 2 Rev. Stat. 252, § 152, which was afterwards filed in the Greene county clerk's office. By the jurat of this affidavit it appeared that the affidavit

was sworn to on the 26th September, which was on Sunday. But it was shown that this was a mistake in dating the jurat; that the affidavit was, in fact, sworn to on the 25th September. The referee reported in favor of the defendant, and the plaintiff now moved to set aside the report.

G. W. CUMMINGS, *for plaintiff*, insisted that the affidavit was void if sworn to on Sunday; and that it was not competent to prove by parol that the affidavit was, in fact, sworn to on the 25th September; and that if sworn to on the 25th September, it was before the expiration of thirty days after the commitment.

JOHN ADAMS, *for defendant*.

By the Court, PARKER, Justice.—The defendant was authorized to discharge Eli Hubbard from imprisonment, on his making the requisite affidavit, after he had remained in prison thirty days. The language of the statute is "after he shall have remained in prison thirty days." (2 R. S. 252.)

Hubbard was committed to the custody of the defendant on 26th August. On the 25th of September he made the affidavit and was discharged. This was the thirtieth day of his imprisonment, excluding the day of his commitment. The rule is well settled that in computing time the first day, or the day when the time begins to run, is to be excluded. (2 Hill, 355; 3 Denio, 12; Rule 63.) If the defendant had been required to do an act *within* thirty days from the happening of an event which had occurred on the 26th August, he could have had the whole of the thirtieth day, that is, of the 25th of September, for that purpose. But if he was prohibited doing an act until *after* the expiration of the thirty days, he could not do it until the next day, that is the 26th of September.

A familiar illustration may be drawn from our late practice. If a declaration was served on the last day of August, the defendant being required to plead in twenty days, had all of the 20th September for that purpose. But as the default could not be entered till after the twenty days, it could not be regularly entered till on the 21st of September.

If Hubbard was imprisoned at noon on 26th August, his thirty days would expire at noon on 25th September. He may not have been committed till the last minute of the 26th August, in which case his thirty days would expire at midnight on 25th September, and he could not be discharged till the 26th September. But the law takes no notice of these fractions of a day. Entire days only can be computed. (*Cornell v. Moulton*, 3 Denio, 12.)

A construction has been given by the courts to similar language in other statutes. By the act of 1840, a writ of *fi. fa.* might be issued



"after the expiration of thirty days from the entry of a judgment." In the *Commercial Bank of Oswego v. Ives*, (2 Hill, 355,) it was held that full thirty days must elapse, excluding the day of entering the judgment, before a *fi. fa.* could be issued; and where judgment was entered on 27th October, and a *fi. fa.* was issued on 26th November, it was set aside for irregularity. Many other cases in support of this construction are referred to in the opinion of that case and in the reporter's note.

And such is the English rule also. The act (2 W. & M., Sess. 1, c. 5,) authorized a landlord to sell a distress "after such distress and notice as aforesaid and the expiration of the said five days." It was held that the day of making the distress was to be excluded, and after allowing the five following clear days, the sale should not be until the seventh day. (3 Chitty's Pr. 109; *Pitt v. Skew*, 4 Barn. & Ald. 208.)

The same rule of construction governed the case of *Small v. Edrick*, (5 Wend. 137.) The Revised Statutes had provided that a notice of trial should be served at least fourteen days *before* the first day of the court. It was held to mean fourteen full days, exclusive of the day of service, and a notice of trial served on the *ninth* for the twenty-third day of the same month was declared to be insufficient.

I am satisfied the thirty days had not expired when the affidavit was made, and without expressing any opinion on the other questions, I think the report of the referee should be set aside.

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## SUPREME COURT.

THEODORE GRAVES vs. LEONARD BLANCHARD et al., Assignees of Lee T. Rowley.

A referee, to whom the whole cause is referred, has power and is required, in cases falling under § 306 of the Code of Procedure, to decide the question of costs.

His power, in this respect, is the same as that of a judge of this court, at special term.

The case of *Van Valkenburgh v. Allendorf*, *ante*, page 40, explained.

*Washington Special Term, March, 1850.*—This was a bill in equity, filed in this court, in October, 1847. The cause was put at issue by a replication, and was brought to a hearing on pleadings and proofs, in October, 1848, at the Washington special term; and was then referred, by the consent of the solicitors to a sole referee "to hear the same and report thereon." On the 25th September, 1849, the referee made a report that

he had heard the proofs and allegations of the parties, and duly deliberated thereon, and that he found due to the plaintiff, from the defendants, the sum of \$669.68. The decree then specified the manner in which the said sum was to be paid by the defendants, as amongst themselves; *directed that neither party should recover costs as against the other*; and dismissed the bill as to defendant Blossom, without costs.

A motion was made, on the part of the plaintiff, for costs. The motion was based upon the ground that the referee had no jurisdiction, under the order of reference of the question of costs, and that that part of his decision was a nullity. The motion was argued by the plaintiff's counsel, as if the cause stood for hearing on the equity reserved, as to the question of costs, and the argument embraced the whole merits of the cause.

B. F. AGAN, *for the plaintiff*.

J. GIBSON, *for defendant*.

WILLARD, Justice.—If the referee had jurisdiction of the question of costs, the present motion must be denied. For an error in granting or refusing the general costs of the cause, the remedy is by appeal. (2 R. S. 605, § 79.) Chapter 4 of title 11th of the Code is not applicable to this case. With respect to interlocutory costs resting in the discretion of the court, no appeal lay under the former practice. (See *Buloid v. Miller*, 4 Paige, 473; *Collins v. Winslow*, 3 Paige, 88.) An appeal from an order, granting or refusing the general costs, must be taken within fifteen days after notice of the order. (2 R. S. 605, § 79, *supra*.)

As this cause was pending on the first day of July, 1848, section five of the act to amend an act entitled an act to facilitate the determination of existing suits, in the courts of this state, passed April 11, 1849, is applicable to it. That section is the same as the corresponding section in the original act of April 12, 1848. It is in these words: "The report of the referee or referees, *upon the whole cause*, or upon the whole of any issue therein shall stand as the decision of the court, in the same manner as if the cause or issue had been determined by the court, at a special term, and may be reviewed in like manner."

On advertng to the order of reference it will be seen, that the *whole cause* was referred. It is thus: "On filing the written consent," &c. &c. "Ordered, that this cause be, and the same is hereby referred to Charles F. Ingalls, Esq. as the referee, *to hear the same and report thereon*." The reference was not confined to some particular issue or fact, but embraced the cause; that is, the *whole cause*, without exception. The referee was required to *hear* the same; that is, to hear the whole

cause. As the whole comprehends all its parts, he was thus required to hear, as well the part of the cause which related to the costs, as that which related to the damages. The reference thus embraced not only the principal subject-matter, but everything incidental thereto. The referee was required to report thereon; that is, upon the whole subject of the reference, which in this case was the *whole cause*. (1 C. Reporter, 125, *Renouil v. Harris*.) A report, to be co-extensive with the cause, must embrace the question of costs as well as damages, or other relief, prayed for in the bill. The 5th section, before cited, enacts, that the report upon the *whole cause* shall stand as the decision of the court, in the same manner as if the cause had been determined by the court, at a special term, and may be reviewed in like manner.

Had this cause been determined at a special term, on pleadings and proofs, the decree would have embraced every question litigated in the cause, whether it related to the costs merely, or to the other relief sought. An appeal would have lain from the whole, or any part of the decree. The referee stands in the place of the judge, holding the special term. Having heard the whole cause upon its merits, he is the most fit person to decide upon the question, whether under § 306 of the code, costs shall be allowed or not, and if so, to which party. That section says that costs may be allowed or not, at the *discretion of the court*. The referee to whom the whole cause is referred, is the court to whose discretion this matter is confided. It is idle to say he is not the court for this purpose, if his decision is to stand as the decision of the court, and is open to appeal in like manner.

Whatever doubts formerly existed, it is now made clear that a judgment may be entered on the report of a referee, in the same manner as upon the decision of a judge, when the cause is tried by him. (§ 267, 278.) The mode of review is the same in both cases. In those actions where costs follow, as a matter of course, they are awarded as well upon the report of the referee as upon the decision of the judge, without any subsequent application to the court.

Although legal and equitable remedies have been merged by the code, and the distinction between the two abolished, yet, to a certain extent, the 306th section reminds us of the former practice, as it applies only to cases of equitable cognizance. Other sections prescribe costs in every case, where in actions at common law they were recoverable, and section 306 fills precisely the space which the Court of Chancery occupied, under the former system. A cause, where it is not prescribed by the code to which party costs shall be allowed, and where that matter is left to the discre-

tion of the court, contains one more element of discussion than other matters of litigation ; and the whole *cause* cannot be said to be decided, unless the question of costs is embraced in the judgment. If such cause be referred to a referee to report thereon, his report is incomplete, unless it covers the question of costs. Those remarks do not apply to cases where only a specific question has been referred. The report can never be broader than the order of reference.

The case of *Van Valkenburgh v. Allendorph et al.*, 4 Howard's Pr. Rep. 40, has been urged on the part of the plaintiff, as settling this question in his favor. Mr. Justice HAND, while expressing doubts on the subject, expressly admitted, that it was not necessary in that case, to decide the question, whether a referee, in cases falling within section 306, could report upon the question of costs ; and the point was left open. In the present case, it is directly involved and cannot be evaded.

While I entertain no doubt in this case, I cannot dismiss the subject without adding, that a decision which should take from the referee the power of deciding on the question of costs, under section 306, in cases where he is charged by the order of reference, *with the cause*, in contradistinction from a *specific question*, would be attended with intolerable inconvenience, delay and expense. No court is so well prepared to decide upon the question of costs, as the tribunal which has heard the whole cause and disposed of it on the merits. To put another tribunal in possession of the same means of correctly determining the question, the whole cause must be re-argued as fully as at first. Thus nothing would be gained by the reference, and the delay and expense of a second argument be incurred. So closely is the question of costs interwoven with the main issues in the cause, that courts will never hear an argument upon the question of costs, after the residue of the controversy has been adjusted by the parties.

A referee, under the code, is not merely a substitute for a master, under the former practice, but is clothed with the power of a judge at special term. When a *specific question* is referred to him, his office resembles that of a master ; when the *whole issue* is referred to him, he takes the place of the court ; his report thereon stands as its decision, and may be reviewed in like manner. (Code, § 271, 272.)

The report of the referee is conclusive until reversed by appeal, or a re-hearing be granted. The present motion, therefore, must be denied. But as doubts have been cast upon the question, and it is also a new one, the motion will be denied without costs, and without prejudice to an appeal or motion for a re-hearing.

## SUPREME COURT.

MATTHEW MORRISON agt. JOHN S. IDE and others.

A discontinuance, without the payment of defendant's costs, is a nullity.

Where a motion has been granted or denied, and nothing is said about costs in the order deciding it, the clerk can make no allowance for costs of such motion in the final costs of the action.

The code provides for no costs of motion, unless the same are allowed and the amount fixed by the court on the decision of the motion.

The allowance provided in section 307 of the code, "for all subsequent proceedings before trial, seven dollars," is not chargeable till the cause has been noticed for trial.

*Rensselaer Special Term, April 1850.*—The plaintiff moved to strike this cause from the circuit calendar with costs. The following facts appeared in the affidavits presented to the court. Jefferson county was designated in the complaint as the place of trial. The answer was served 12th November, 1849. Defendants' attorneys moved to change the place of trial to Rensselaer, and the motion was granted on 3d December, 1849. Nothing was said about costs of motion in the order changing the place of trial. On the 21st December, 1849, plaintiff's attorney wrote to defendants' attorneys, saying the action would be discontinued and asking for a statement of their disbursements. On 6th January, 1850, plaintiff's attorney received in answer a statement of the costs claimed by defendants' attorneys, in which the disbursements were stated at \$1.92.

On 23d of same month, plaintiff's attorney sent to defendants' attorneys notice of discontinuance, and enclosed seven dollars to pay costs and disbursements. On the 29th, the \$7 was returned, with notice that defendants' attorneys declined to receive it, and that they would insist upon the payment of \$23.92. The seven dollars was again tendered and refused, when defendants' attorneys noticed their bill of costs made out at \$23.92 for taxation before the county clerk of Rensselaer, and they were taxed by him at that sum on 18th February, 1850. The bill, as taxed, consisted of the following items:

|                                                       |   |   |   |   |   |         |
|-------------------------------------------------------|---|---|---|---|---|---------|
| Costs before notice of trial,                         | - | - | - | - | - | \$5 00  |
| Subsequent, and before trial,                         | - | - | - | - | - | 7 00    |
| Motion to change place of trial, \$10; copy rule, 05, |   |   |   |   |   | 10 05   |
| Oaths 62 1-2, postages \$1.25,                        | - | - | - | - | - | 1 87    |
|                                                       |   |   |   |   |   | <hr/>   |
|                                                       |   |   |   |   |   | \$23 92 |

Payment of such taxed costs was demanded of plaintiff's attorney and

refused and on some day defendants' attorneys noticed the cause for trial, and put it on the calendar for the Rensselaer circuit.

M. I. TOWNSEND, *for plaintiff.*

SEYMOUR & ROMEYN, *for defendant.*

PARKER, Justice.—The question to be decided is, whether this action was discontinued by the service of the notice of discontinuance, and the payment of five dollars and disbursements. A discontinuance without the payment of costs, is a nullity. (*Huntington v. Forkson*, 7 Hill, 195; *White v. Smith*, 4 Hill, 166.) And so it was treated in the present case, by the defendants' attorneys, who claimed that the money tendered was insufficient to pay their costs.

The defendants' attorneys were clearly wrong in charging in their costs \$7 for their costs subsequent to the notice of trial, and before trial. That item is not chargeable until an action has been noticed for trial. It was intended as a compensation for preparing for trial, after notice of trial; and in this case the notice of trial was not served till after the tender and service of notice of discontinuance.

Were the defendants' attorneys entitled to charge \$10 for costs of the motion changing the place of trial?

Under the late practice, it was not usual to charge either party with costs of a motion to change venue, at the time of deciding the motion. Nothing was said in the rule about costs, and in such case the costs were to abide the event of the suit. The successful party in making out his final bill of costs, inserted the general items allowed in the fee bill for services on special motions. But we have now no such allowance in the fee bill. The code gives no compensation for services on special motions, but the court, in its discretion, is authorized to allow costs on a motion, not exceeding ten dollars. If the judge makes no such allowance in the order, the clerk has certainly no power to review his discretion and make an allowance. It is right that the unsuccessful party should pay the costs of such a motion, but such payment cannot be enforced under the code, unless it is provided for, and the amount fixed in the order by which the motion is decided. Perhaps it would be sufficient to say in the order that costs are fixed at ten dollars to abide the event of the suit. It has been heretofore thought equitable, that the costs of such motions should fall on the party who fails in the suit, rather than on the party who fails in the motion.

In this case the defendant was allowed, by section 307 of the code, "for all proceedings before notice of trial, five dollars." This, with his

disbursements, was the extent of his legal claim for costs when the notice of discontinuance was served. The money tendered was, therefore, sufficient, and the cause was legally discontinued.

The clerk had no power to tax the costs. He is only authorized, by section 311, to insert in the entry of judgment the sum of charges for costs and disbursements. No taxation is deemed necessary, and no adjustment in other cases is provided for. It is supposed the amount due can be readily ascertained by the parties, by reference to the provisions of the code.

The motion must be granted, but the practice having been somewhat unsettled, no costs of motion will be allowed.

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## SUPREME COURT.

HAMILTON LITTLEFIELD agt. HENRY G. MURIN.

After the lapse of a reasonable time for the service of the copy of complaint, after demand pursuant to section 130, if not served, the defendant may move for judgment, dismissing the plaintiff's complaint. Analogous to the old practice for judgment of *non pros.* for non-service of a bill of particulars.

In such cases the complaint may also be dismissed under section 274 of the code, for the neglect of the plaintiff to proceed in the cause, pursuant to statute, against the defendant served with the summons.

*It seems, that twenty-four hours* after such demand may generally be considered a reasonable time.

*Jefferson Special Term, December, 1849.*—Motion by defendant for an order or judgment dismissing the plaintiff's complaint in the nature of a judgment of *non pros.* on account of the non-service of a copy of the complaint. The action was commenced by the service of summons, without the complaint, on the 18th of August last. On the 23d of August, the defendant, by his attorney, demanded a copy of the complaint, and a copy not having been served in pursuance of the demand, this motion is now made.

C. D. WRIGHT, *for defendant.*

D. H. MARSH, *for plaintiff.*

ALLEN, Justice.—By the present code, an action may be commenced by the service of a summons, without a copy of the complaint, and in that case, if the defendant, within ten days after the service of the summons,

demand in writing a copy of the complaint, specifying a place within the state where it may be served, a copy thereof shall be served accordingly, (Code, § 130.) There is no time prescribed by the act within which the copy complaint must be served, and it must therefore be served within a reasonable time. In analogy to the practice upon a peremptory order for a bill of particulars under the former system, which did not prescribe a time within which the bill should be furnished, the copy complaint should be served *instanter*, (*Harman v. Glover*, 10 W., p. 617;) and *instanter*, under the former practice and rules, meant within twenty-four hours, (*Ib.* Rule 50 of 1847.) But the latter clause of rule 59, which defined "*instanter*," has been omitted in the last revision of the rules. Perhaps, in ordinary cases, twenty-four hours after the service of the demand, would be a reasonable time for the service of a copy of the complaint, as it is presumed to have been made out at the time of the service of the summons, but if not, or for any other good reason, a complaint cannot be served within a time which in ordinary cases would be considered reasonable, further time for its service can be granted under the provisions of section 405 of the code. In this case, the plaintiff has omitted to serve the complaint from August to December, so that the question of what should be held a reasonable time does not arise. The last rule of this court, adopted in August, provides that in cases where no provision is made by statute or those rules, the proceedings in this court shall be according to the customary practice as it had theretofore existed in cases not provided for by the statute, or the written rules of the court, (Rule 92.) By that practice, after the lapse of a reasonable time for the service of the copy of the complaint, the defendant should be permitted to move for judgment dismissing the plaintiff's complaint. This is equivalent to a motion for judgment of *non pros.* under the former practice for the non-service of a bill of particulars, (*May v. Richardson*, 4 Cow. Rep. 56; *Seymour v. Craw*, 5 Cow. 279; *Brewster v. Sackett*, 1 Cow. 571.) The complaint may also be dismissed in a case like the present, under section 274 of the code, for the neglect of the plaintiff to proceed in the cause against the defendant served with the summons. An omission to serve a copy of the complaint, in pursuance of the requirements of the statute, is an unreasonable neglect on the part of the plaintiff to proceed in the cause.

It is contended by the plaintiff, 1st, that the defendant's remedy is under rules 14 and 18 of this court, adopted in 1847, by requiring the plaintiff to serve a copy of his complaint within thirty days, and upon default to enter judgment of discontinuance. But those rules were abolished by section 470 of the code, and were not continued by the 92d



rule of August last, that rule expressly excepting from its operation cases provided for by statute or the written rules of the court; and 2d, that his remedy is to procure an order from a judge that the complaint be filed in pursuance of section 416 of the code. But (1) that section only applies, in terms, to process and pleadings which have been served, and the complaint in this action has never been served. (2) If by a liberal construction of the section, it should be held to include a complaint which had not been served, still, the only consequence of an omission to file it in pursuance of an order, is, that the complaint shall be deemed abandoned. The defendant does not recover a judgment, or get his costs of the defence. The action must be proceeded with in some other form to enable him to obtain all the relief to which he is entitled. And (3) it is no answer to the positive requirements of the act, that the complaint shall be served, to say to the defendant that he can compel the plaintiff, under another provision, to file his complaint or abandon it, and if he files it a copy can be procured from the clerk. An order must be entered, dismissing the complaint with costs, including \$10 costs of this motion, unless the plaintiff within ten days after service of a copy of the rule, serve upon the defendant's attorney a copy of the complaint in this cause, and if such copy is served, then in case the defendant finally succeeds in the action, he is to receive as a part of the costs of the cause, \$10 costs of this motion.

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#### SUPREME COURT.

HENRY BRODHEAD et al. vs. CHARLES W. BRODHEAD et al.

An order made by a judge, at chambers, enlarging the time to answer, is an extension of the time to demur.

*Albany Special Term, April, 1850.*—The summons and complaint were served on 5th February last. On the 22d of the same month the defendants' attorney served an order made by the county judge of Sullivan county, giving the defendants "twenty days additional time in which to serve an answer in this cause." On the 11th of March defendants' attorney served a demurrer to the complaint. The plaintiffs' attorney informed the defendants' attorney that he deemed the demurrer irregular, and asked him to withdraw the same, which he refused to do; and on an affidavit of these facts and notice of motion, the plaintiffs' attorney now moves to strike out the demurrer on the ground of irregularity.

H. BRODHEAD, Jr., *for plaintiffs.*

J. V. L. PRUYN, *for defendants.*

PARKER, Justice.—The plaintiffs ask to strike out the demurrer as irregular, on the ground that the enlargement of the time to answer gave the defendants no additional time to demur. It was held in the late Court of Chancery, in *Burrall v. Raineteaux*, 2 Paige, 331, that after a general order made by a vice chancellor, at chambers, giving further time to answer, the defendant could not put in a demurrer, except on special leave of the court; and if he put in such demurrer without leave, it would be ordered to be taken off the files of the court for irregularity. But this decision rested upon the ground, that the time to demur could not be enlarged by a chamber order, but that an order of the court was necessary for that purpose. In this respect, the Court of Chancery followed the English practice, (1 Wils. Ch. Rep. 468; 3 Swans. Rep. 683.) An order to enlarge time to answer could be made at chambers, but an order to enlarge time to demur could only be made in court.

In *Bedell v. Bedell*, (2 Barbour Ch. Rep. 99,) it was held that this principle did apply to a case of an extension of the time by the voluntary stipulation of the complainant's solicitor. In such case an extension of time to answer gave the defendant the right to demur within the extended time. In its more liberal sense, the demurrer is an answer to the complaint, and so it was regarded under the late Chancery practice. It was not the restricted meaning of the word "answer," but a want of power to use the word at chambers in its more liberal sense, that led to the above cited decision in 2 Paige, on which the plaintiff relies.

Under the code, there is no question of the power of a judge at chambers to extend the time to demur as well as to answer. By section 405 the time within which any proceeding in the action must be had after its commencement, except the time within which an appeal must be taken, may be enlarged by a justice of the Supreme Court or a county judge. An enlargement of the time to answer is, therefore, under our present practice, an extension of the time to demur.

The word answer is sometimes used in the code as including a demurrer. By section 246, judgment may be had, if the defendant fail to answer the complaint; and again, in the same section, to entitle the plaintiff to judgment, he must file proof that no answer has been received. He is not to say anything in his affidavit about a demurrer, but it will not be contended that he may take judgment, if a demurrer has been served.

This motion must be denied, but the question being a new one, no costs are allowed.

## SUPREME COURT.

JAMES PEPPER agt. LOREN GOULDING.

Rule 24 reads as follows: "When either party desires a review of a trial before a referee or referees, in a case where the whole issue has been reported upon, he shall prepare a case, and the respective parties shall pursue the practice, with respect to making and settling of the same, prescribed by rule 15, as far as the same is applicable. *Such case shall be heard only on appeal at a general term.* When the report is not upon the whole issue, it may be reviewed on special motion at a special term.

On filing a report of referees, where a report is made on the whole issue, judgment may be entered, *as a matter of course.*"

Code, § 272, reads as follows: "The report of the referees upon the whole issue shall stand as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court; and their decision may be excepted to and reviewed *IN LIKE MANNER, or a rehearing may be granted by the court in which the judgment is entered.*"

Section 268 reads as follows: "Either party may except to a decision on a matter of law arising upon such trial, within ten days after notice of the judgment, in the same manner and with the same effect, as upon a trial by jury. And either party desiring a review upon the evidence appearing on the trial, *either of the questions of fact or of law,* may, at any time within ten days after notice of the judgment, make a case containing so much of the evidence as may be material to the question to be raised. The case shall be settled according to the existing practice." (*This section is in relation to trial by the court.*)

Section 278 reads as follows: "Judgment upon an issue of *law or of fact,* or upon confession, or upon failure to answer, (except where the clerk is authorized to enter the same by the first subdivision of section 246 and by section 384,) shall, in the first instance, be entered upon the direction of a single judge, *or report of referees, subject to review at the general term,* on demand of either party, *as herein provided.*"

Section 348 reads as follows: "In the Supreme Court, the Superior Court of the city of New York, and the Court of Common Pleas for the city and county of New York, an appeal *upon the law,* may be taken to the general term, for a judgment entered *upon the direction of a single judge* of the same court. Security must be given upon such appeal, in the same manner as upon an appeal to the Court of Appeals. In the Supreme Court the appeal shall be heard in the same manner as if it were an appeal from an inferior court."

The question is, whether, upon a judgment entered upon a report of referees upon the whole issue, involving questions of *fact alone,* a party is *entitled* (under the latter clause of section 272,) to have a motion for a new trial upon the merits heard and decided *at a special term,* or entitled to a *rehearing* at special term, (notwithstanding the 24th rule.) And, whether there is any other remedy for review in such cases; as by § 348, *appeals* are confined to questions of *law only.*

*Held,* that a hearing at special term is not necessary to authorize the granting of a new trial for errors of fact in a report of referees. Such errors may be reviewed and corrected on appeal. An appeal from such a judgment is not within the provisions of sections 348 and 349, which authorize no appeal except from a judgment or an order entered *upon the direction of a single judge.* A judgment upon report of referees is not so entered. It is entered *as a matter of course.* The distinction is clearly taken in section 278.

*Appeals* from judgments entered on the report of referees are given by sections 262 and 268 in connection with section 278 (copied above and italicised to meet the points raised in the case.)

The latter clause of § 272, commented upon as obscure and ambiguous.

*Oneida Special Term, Dec. 1849.*—The plaintiff obtained a report of referees in his favor, and thereupon entered judgment for the amount reported due, with costs; and an appeal was brought and perfected upon that judgment. A motion was made by the defendant for a *rehearing* on the judgment record (in which a case setting out the evidence taken by the referees was incorporated,) upon the ground that the questions arising on the case involved no point of law, but were questions of fact exclusively.

W. J. BACON, *for the defendant.*

H. A. FOSTER, *for the plaintiff.*

GRIDLEY, Justice.—The question is, whether the defendant is entitled to have a motion for a new trial founded upon a case involving questions of fact alone, heard and decided at a special term. The twenty-fourth rule of the court is decisive of this question. It provides that such a case "shall only be heard on appeal at a general term."

The defendant, however, insists that he has a right to such a rehearing by the last clause of the 272d section of the code; and that the court have no power, by a general rule, to deprive him of a right conferred by the statute. He argues that by virtue of the 384th section of the code, appeals are confined to questions of law only; and that unless he can have a rehearing otherwise than on an appeal, he is of necessity deprived of all remedy in a case where he can show a clear mistake of fact on the part of the referees.

It is undoubtedly true, that if the right to a review of the report of referees at a special term be given by the statute, no rule of court can take it away. But I do not think that a hearing at special term is necessary to authorize the granting of a new trial for an error of fact.

1st. I am of opinion that errors of fact in a report of referees may be reviewed and corrected on appeal. An appeal from a judgment entered on the report of referees, is not within the provisions of chapters 3 and 4, of the 11th title of the Code. Sections 348 and 349 authorize no appeal except from a "*judgment*" or "*an order*" "*entered upon the direction of a single judge.*" A judgment upon the report of referees is not so entered. It is entered, of course, and without any order of a judge. The distinction is clearly taken in the 278th section of the code. That section provides that judgment upon an issue of law or of fact, &c. shall in the first instance be entered upon the direction of a single judge, or

"reports of referees, subject to review at the general term, &c." Justice HAND, in *Van Valkenburg v. Allendorf*, 4 Howard 39, reconsidered his decision in *Deming v. Post*, (Code Rep. 121,) and held that judgment should be entered on a report of referees, without any direction of a judge; so, too, the last clause of rule 24 provides that "on filing a report of referees, made on the whole issue, judgment may be entered as a matter of course." The appeal from a judgment entered on the report of referees is given by other sections. By the 272d section, it is provided that the report of referees on the whole issue shall stand as the decision of the court, that judgment may be entered thereon in the same manner as if the action had been tried by the court; and their decision may be excepted to and reviewed in *like manner*. How, then, is the judgment, in a cause tried by the court, reviewed? Being entered on the direction of a single judge (§ 278,) it is reviewed by appeal. But, although it is reviewed in "*like manner*," it by no means follows that questions of fact cannot be reviewed. The phrase, "*in like manner*," merely means, in this connection, *by appeal*. Again, the very provision in section 268, to which reference is made, and to which the practice of reviewing the decision of referees is assimilated, expressly contemplates a "review upon the evidence appearing on the trial either of the questions of fact or of law." If I am right in the foregoing conclusions, an appeal in the case of a referee's report, not being within the cases provided for in section 348, is not within its limitation to questions of law. An appeal from a judgment, in a cause tried by the court, however, is within the cases provided for in section 348. But it is not necessary to decide here, whether the limitation to questions of law, contained in that section, must not be taken, with the exception of cases where the trial was by the court, and where the right of review, both of questions of law and fact, was given by the express words of the act, in the 268th section. But,

2d. If such exception be not within the fair construction of sections 348 and 268, construed together, *then* there must be a power in the court to review judgments entered on a report of referees, and on a trial by the court without an appeal. For if this be not so, then a most important right, given by the express words of the act, is abolished; and the enactment itself, giving the right of reviewing questions of fact in cases of this description, has become a dead letter. Such review must, however, be at the *general term*. It must also be as provided by the code. The words in section 278, as "*herein provided*," must be taken as equivalent to the phrase "*as provided in this act*." And I am aware of no provisions for reviewing judgments at the general term except by appeal. But, as already intimated, it is not necessary to decide that question now.

8d. It is not to be denied that the last phrase of section 272, is obscure and ambiguous. If the framers of this provision had any clear ideas of the practice they were establishing, they have failed to make their views intelligible. When the Legislature say that a re-hearing may be granted by the court in which the judgment was entered, they do not say that it may be granted at special term. The judgment is entered in the Supreme Court; and, inasmuch as the judgment on the report of referees is not entered by the direction of a single judge, there is no reason for holding that the re-hearing is to be granted by the Supreme Court at a special term. It may be that this clause was not intended to apply to a motion for a new trial on the merits. If the referees should have made a clear mistake (for instance, in adding up a column of figures,) and should make an affidavit of the fact, a re-hearing might be granted upon a non-enumerated motion on the ground of accident or surprise. This provision may be intended for such a case; or it may be intended for the County Court. That court has jurisdiction of some special cases, such as mortgage foreclosures. In such, a set-off might be set up, and a reference of the whole issue to a referee. In such case the judgment would be entered in the County Court, and a re-hearing might be granted by the County Court, being the same court in which judgment was entered. The provision *may* apply to such a case.

4th. In this case, it appears that the defendant has appealed; and thus made his election of remedies. And granting that he *had* an alternative remedy, he is not entitled to both.

The motion must be denied with \$10 costs.

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## SUPREME COURT.

MARY WHITNEY agt. WATERMAN & WHITNEY.

An appeal does not lie from the special to the general term, upon an order *refusing to strike out* of a pleading alleged immaterial, impertinent or scandalous averments; because it cannot involve the merits, (Code, § 349.) An order *striking out* such averments may be the subject of appeal, where it appears that such matter, stricken out, involves the merits.

*New York General Term, May 21, 1850, before EDMONDS, Presiding Justice; EDWARDS and MITCHELL, Justices.*—The plaintiff moved, at special term, to strike out certain parts of the answer because they were immaterial, impertinent or scandalous. On the motion the question was sent

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to a referee, who reported, allowing four exceptions and disallowing the residue of the exceptions, some nineteen in number. His report was confirmed at special term, and from so much of the order as disallowed the exceptions to the answer, the plaintiff appealed to the general term.

J. E. BURRILL, Jr., *for appellant*.

C. O'CONOR, *for respondents*, objected that the order of the special term was not the subject of appeal, as it did not involve the merits.

EDMONDS, Presiding Justice, stopped the counsel in arguing the merits of the exceptions, and said that the court entertained no doubt that the order at special term was not the subject of an appeal. The motion below was to strike out certain parts of the answer because they were not material to the matters in controversy; and surely an order refusing to strike out immaterial averments, could not be said to "involve the merits of the action."

An order, refusing to strike out such averments in a pleading, can in no case be the subject of appeal, because it cannot involve the merits within section 349 of the code. An order striking them out, may be the subject of an appeal, when it shall be made to appear that the matter ordered to be stricken out does involve the merits; but it is not easy to perceive how an order leaving in matter impertinent, scandalous or immaterial, can be said to involve the merits. In that respect, the decision at the special term must be final.

This appeal must therefore be dismissed.

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## SUPREME COURT.

WILLIAM TAYLOR, Respondent, vs. DAVID W. SEELEY, Appellant.

Where an appeal from a judgment rendered by a justice of the peace, is heard by the Supreme Court, because of the incompetency of the county judge, the successful party will recover the same costs as if the appeal had been decided by the county judge. He is not in such case entitled to tax the same amount of costs as on an appeal from a judgment of a county court.

*Albany Special Term, March, 1850.*—On the 6th day of December 1848, the above named appellant brought an appeal to the Schoharie County Court, from a judgment rendered against him by a justice of the peace. The county judge refused to hear the appeal, on the ground that

he had been consulted as counsel, and filed his certificate under 81st section of the Judiciary Act, by which jurisdiction was vested in the Supreme Court. The Supreme Court, at February term, 1850, reversed the judgment of the justice. The costs were taxed on due notice by the clerk of Schoharie, who allowed to the appellant:

|                                                                                      |         |
|--------------------------------------------------------------------------------------|---------|
| For proceedings before argument,                                                     | \$15 00 |
| For argument,                                                                        | 30 00   |
| And for five different terms that the cause was on<br>the calendar, and not reached, | 50 00   |

These items were objected to, and the respondent moves for a re-taxation.

TH. SMITH, *for plaintiff*.

J. S. HAWES, *for defendant*.

PARKER, Justice.—The question to be decided on this motion is whether the appellant is entitled to the same costs as on an appeal from a County Court to the Supreme Court, or whether he is limited to the costs he would have recovered if the appeal had been heard in the County Court. This must be decided under the code of 1849, which was in force at the time of the reversal of the judgment.

Where the county judge is incompetent to hear the appeal, the Supreme Court is authorized to act in his place. Jurisdiction is conferred for that purpose by the 81st section of the Judiciary Act, which provides, that on filing the certificate of the county judge "such proceedings shall be had therein, according to the practice of such court, as might have been had in such county court, if such cause or matter had remained therein."

On appeals from judgments rendered by courts of justices of the peace to County Courts, the successful party recovers fifteen dollars on reversal, and twelve dollars on affirmance. (Code, § 371.) I think no greater compensation can be recovered where the cause is heard by the Supreme Court. It is still an appeal from a judgment of a justice of the peace, and heard by the Supreme Court in the place of the county judge. It is not certainly the fault of the respondent, or of the opposite party, that the county judge was incapacitated to hear the appeal, and I think it could not have been intended to inflict upon the unsuccessful party a bill of costs, six times greater than it would have been if it had been decided by the County Court. The proceedings throughout are to be the same as if the cause had remained in the County Court.

The costs allowed by section 307, sub. 6, are not applicable to this case. It is true the language is broad enough to include every case of



appeal except an appeal to the Court of Appeals; but it cannot be construed as applicable to an appeal, the costs of which are specially provided for by section 371. Both sections must be consulted, in ascertaining the intent of the act.

There must be a re-taxation, neither party to have costs of this motion.

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### SUPREME COURT.

#### In the matter of HENRIETTA HICKS' Will.

Where an appeal was taken from the decision of a surrogate, refusing to admit a will to probate; which decision was reversed by the circuit judge on a question of fact, and a feigned issue ordered: upon which issue the appellant obtained a verdict, without appearance by the respondent. And the respondent moved before a judge at chambers to set aside the verdict, on the ground that the appellant had died pending the appeal, and no revival had; which motion was denied. And on appeal to the general term, *held*, that the order must be affirmed, for the reason that the surrogate had exclusive jurisdiction of the matter. This court had the cause only to try the feigned issue. Also on the ground that the judge *at chambers* had no right to grant a motion in a cause pending at the time the code passed; nor in a case of a special statute proceeding like this.

*New York General Term, February, 1850, before EDMONDS, Presiding Justice; EDWARDS and MITCHELL, Justices.*—On an appeal from a decision by the surrogate of New York, refusing to admit a will to probate, the circuit judge reversed the decision on a question of fact, and ordered a feigned issue.

The cause being reached in its order on the calendar, and no one appearing for the respondent, a verdict was taken for the appellant.

The respondent afterwards moved before one of the judges at chambers, to set aside the verdict, on the ground that the appellant had died pending the appeal, and the case had not been revived. The motion was denied, and an appeal taken to the general term.

N. F. WARING, *for respondent.*

C. O'CONOR, *for appellant.*

By the Court, EDMONDS, Justice.—I fully concur with the justice at special term. This court has the case merely for the purpose of trying the feigned issue. For all other purposes it is in the surrogate's court, and to that it must ultimately go back for final determination, and there the question of revival or abatement properly belongs.

There is, however, another reason apparent on the face of the papers, why the order denying the motion must be affirmed. A judge, at chambers, had no right to grant the motion. The section of the code (§ 401,) authorizing motions to be heard at chambers, does not apply to suits existing at the time the code passed, nor to a special statute proceeding, as this is.

Order of special term affirmed with costs.

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## SUPREME COURT.

JOHN KNOWLES agt. FRANCIS GEE and others.

Upon a motion under § 160 of the Code, to strike out irrelevant or redundant matter in an answer, which involved the construction and true intent and meaning of the 2d subdivision of § 149, which requires any new matter to be stated in ordinary and concise language, &c.; also of the 2d subdivision of § 142 which requires a complaint to contain a statement of the facts constituting the cause of action in ordinary and concise language, &c., *held*, that the Legislature intended to preserve as many of the rules of the common law as are consistent with the new forms of pleading, and that the facts required by the provisions of the Code, to be stated, are in general such facts as were required to be stated in pleadings at common law—that is, issuable facts, facts essential to the cause of action or defence, and not those facts and circumstances which merely go to establish such essential facts.

The cause of action or defence must be stated fully and clearly; general pleading is abolished.

But the facts only, and not the mere evidence of facts, should be stated.

(*The question of pleading very fully reviewed and considered in reference to the requirements of the Code.*—SELDEN, Justice.)

*Wayne Special Term, April 1850*—The complaint in this case alleges, in a very clear and concise manner, that the plaintiff at the time of the acts complained of, was the owner and in possession of a certain lot of land with a crop of wheat growing thereon; under and by virtue of a deed of conveyance from the defendant Francis Gee; and that the defendants wrongfully and forcibly entered upon the said lot of land, and cut and carried away the wheat; claiming damages to the value of the wheat; and contains in all, about two folios.

The answer sets up in defence, that the deed mentioned in the complaint, was obtained by fraud; and goes into a history of the transactions between the parties, which ultimately led to the delivery of the deed, giving all the circumstances with the utmost minuteness and particularity of detail; extending to upwards of sixty folios.

The plaintiff moves to strike out a large portion of the answer, embracing the details of the evidence relied upon to sustain the charge of fraud.

J. C. SMITH, *for plaintiff.*

L. SHERWOOD, *for defendants.*

SELDEN, Justice.—The question presented by the motion is, how far the Legislature, by its recent reforms of the practice and pleadings in the courts of this state, intended to abrogate the rules heretofore applied to pleadings in the courts of common law, and to substitute those which prevailed in the Court of Chancery.

No more important question than this, in my judgment, can arise under our new system of legal proceedings, and none, the settlement of which will have a more material influence upon the convenient administration of justice in this state, while the present system continues.

It cannot be denied that the Legislature by adopting the *forms* of pleading heretofore in use in the Courts of Chancery, have given unequivocal evidence of a preference for those forms over those of the common law.

On the other hand, the abolition of the only court in which those forms were used, the transfer of their jurisdiction to the courts of common law, and the retaining of the forms and modes of trial peculiar to the latter, forbids the conclusion, that it was intended to subvert the entire system of rules which prevailed in the common law courts, and to substitute those of the obnoxious Court of Chancery.

In continuing two systems of jurisprudence, therefore, administered under different forms by different tribunals, and resolving them into one, it became indispensable to borrow something from each; and the object of the Legislature seems to have been, to select from both that which was most valuable; rejecting in each those portions which experience had proved to be productive of inconvenience. It is the duty of courts to aid in accomplishing this design, and in doing so they must necessarily look to the evils which existed, as well as to the means resorted to for their removal. The adoption of the forms of chancery pleadings, though not the necessary, was the natural consequence of adopting that principle in chancery jurisprudence, which recognized only one form of action for all cases. Many of the technical rules of the common law system of pleading may well have been considered as originating in and connected with, those distinctions between the different forms of action which were peculiar to that law. There are, however, some of those rules which are so well adapted to accomplish the end of all pleading, that I should find

it difficult to persuade myself that the Legislature could have intended to abrogate them.

No one, of the least experience in courts of justice, or even in the affairs of life, can have failed to observe that almost all legal controversies depend upon some one or two points out of which the whole difficulty has arisen. A difference upon a single point will often break up the harmonious relations between two individuals, and lead them into a protracted and expensive litigation. The point in dispute may arise either upon a matter of fact, or a question of law, but that once settled, the whole controversy ceases. The object of judicial proceedings is to ascertain and decide this disputed point; and it is essential to the termination of every legal contest, that it be evolved and distinctly presented for decision. This indispensable end of judicial pleading was attained in different modes by the civil and common law. The rules of the latter were designed to develop and present the precise point in dispute upon the record itself, without requiring any action on the part of the court for that purpose. Hence the parties were required to plead until their respective allegations terminated in a single *material* issue, either of law or of fact; the decision of which would dispose of the case. The result of this process was perfectly simple; but the system of rules by which it was attained, was necessarily artificial and complex. If always skilfully applied they would be sure to produce the end desired; but it would sometimes happen that through ignorance or mistake, an issue would be formed, or a point presented, not involving the real merits of the controversy, and a decision be thus produced contrary to the real justice and equity of the case. This was the sole vice of the system; but it was sufficient to create a strong feeling against what is termed special pleading.

Two remedies were applied. One was, a liberal allowance of amendments and repleaders; the other, general pleadings, under which parties were allowed the widest scope in the proof of facts not appearing upon the record. The latter expedient has had many advocates, but the evils to which it tended were so obvious that it is now generally condemned, and is repudiated by the Code.

By the civil law the parties were not required to plead to issue, but were permitted to spread all the facts in detail, constituting their cause of action or defence, at large upon the record; questions of law were not necessarily separated from questions of fact, but the whole case was presented in gross to the court for its determination.

This system, of course, avoided the evil which attended that of the common law, of sometimes causing the case to turn upon some false, im-

material, or technical issue; but it had other defects peculiar to itself. It threw upon the courts the labor of methodising the complex allegations of the parties, and developing the real points in dispute.

They might be aided more or less in this by the preparation of abbreviations or abstracts by the parties or their counsel; but this work would often be very imperfectly performed, and would of course leave much to be done by the court before it could arrive even at the real point to be decided.

There was an additional reason, too, why this system was not adopted in the common law courts in England. The determination of questions of law and of fact belonging to different tribunals, it was of course extremely convenient, if not indispensable, that they should be separated upon the record before the case was presented for trial. Besides, as little time could be afforded at *nisi prius*, to evolve from a complicated mass of facts the points about which alone the parties differed, the rules requiring all issues to be *certain* and *single*, would be sure to commend themselves to all who were in any way concerned in the disposition of such cases.

On the other hand, when the Court of Chancery took its rise, and began to take cognizance of judicial contests, the mode of trial by jury not appertaining to that court, the inconveniences resulting from mingling questions of law and of fact, to be referred to different tribunals, was not felt by it. As the chancellor could take all the time requisite for the fullest examination, and as he assumed originally to eschew the strict and technical rules of the common law, and to proceed upon the broad equities of the case, he naturally encouraged the presentment of the facts at large. Hence the adoption of the forms of the civil law. Now no one will dispute that to disencumber the record of all extraneous matters, and of every thing irrelevant and immaterial, and thus present to the judicial mind the naked point to be passed upon, is a highly desirable object; nor will it be denied by any one really acquainted with the subject, that the system of common law pleading was admirably adapted to accomplish that end. Nevertheless, it had one defect which has effected its overthrow in this state. It gave advantages to the skilful over the unskilful, which the system of the civil law did not afford. It may be safely assumed that it is this which has subverted it; because its offensive but harmless fictions, and its objectionable subtleties might all have been easily lopped off, without trenching upon that vital principle, which required all issues to be *single*, *certain* and *material*.

But while it is conceded that common law pleading, *as a system*, is supplanted, it is unnecessary to admit that every vestige of its valuable

rules has been swept away. It has been my object in this brief and imperfect sketch of the distinguishing characteristics of the two systems, so to exhibit the value of some of those rules, as to show that wisdom requires them to be retained, and the Legislature must have so intended, so far as could be done consistently with the main object in view, to wit: that of so simplifying the mode of pleading that it could not be perverted by chicanery and cunning to purposes of injustice. The code itself bears evidence of a due appreciation by the Legislature of the importance of certainty and precision in the statement of a charge or a defence, as well as of a separation of various defences, so that each shall be singly presented. See sections 150 and 160, adopting in these respects the principles of the common law, and enforcing them in a summary manner by motion instead of the more dilatory and expensive proceeding by demurrer.

Upon what, then, rests the position that it was the intention of the Legislature, in its recent reforms, to substitute entire chancery pleadings for that of the common law?

The code has nowhere so said; it is a mere inference from the adoption in substance, of the forms, or rather *names* of the pleadings in the Court of Chancery. This circumstance, however, is more than counterbalanced by the destruction of the court itself—together with the transfer of its jurisdiction; and by the consideration that the complex issues presented by chancery pleadings, are incompatible with trials by jury.

It is said that the form of trial by jury exists in full vigor in the state of Louisiana and other places where civil law pleadings are used. Do those who assert this know how far that system has been modified in those places to adapt it to the changed mode of trial; or what expedients have been resorted to for the purpose of extricating the real matters in issue from the statements in gross of the parties. I am myself uninformed on these points; but of this I feel assured, that to say that the burden of extracting from such pleadings the issues to be tried, of separating the questions of law from those of fact, and of ascertaining what is admitted and what denied, can be thrown upon the judge at the circuit, with any convenience to the public, or safety to the parties, is to discard all common sense, and disregard the plainest deductions of reason. The prolixity of legal proceedings has been one great source of complaint; and a prominent object of the recent reform was supposed to be to simplify and abridge them; an object which would scarcely be attained by permitting pleadings of the kind adopted by the defendant in this case.

This motion is made under section 160 of the code, to strike out the  
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matter objected to as irrelevant or redundant, and the precise question to be passed upon is, whether the defence here is stated in accordance with the true intent and meaning of the 2d subdivision of section 149, which requires any new matter to be stated in ordinary and concise language, &c. This subdivision, and the 2d subdivision of section 142, which requires a complaint to contain a statement of the facts constituting the cause of action in ordinary and concise language, &c., must, as a matter of course, receive the same construction. Having come to the conclusion from the preceding reasoning, that the Legislature intended to preserve as many of the rules of the common law as are consistent with the new forms of pleading—I am prepared, of course, to hold that the facts required by these provisions of the code to be stated, are in general such facts as were required to be stated in pleadings at common law; that is, issuable facts; facts essential to the cause of action or defence; and not those facts and circumstances which merely go to establish such essential facts. The cause of action or defence must be stated fully and clearly, it is true; general pleading is no longer allowed. But the facts only, and not the mere evidence of facts, should be stated. In putting this construction upon the provisions of the code, I believe I am sustained by the opinion of Mr. Justice WELLES, in the case of *Shaw agt. Jacques*, (4 How. Pr. Rep. 119,) at least so far as this case is concerned, which is one purely of common law cognizance.

The motion must be granted with leave to the defendant to amend his answer so as to conform to the principles of this decision, provided he serves such amended answer within ten days after notice of the order to be entered upon this motion.

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## SUPREME COURT.

JAMES NOBLE agt. ALEXANDER TROTTER.

The service of a paper by mail, is good, although deposited in the post office, on the last day for service, *after the mail has closed*, if otherwise made in conformity to the statute and the rules of the court. (The case of *Maher v. Comstocks*, 1 Howard's Pr. R. 87, regarded as standing alone, if not overruled.)

*Chenango Special Term, April, 1850.*—This is a motion to set aside a judgment and for leave to serve the answer, &c. Mr. Cowles, the defendant's attorney lives at Roxbury in the county of Delaware, and Mr. Champ-  
lin, the plaintiff's attorney, resides at Hobart in the same county. On the

last day for serving the answer, the defendants' attorney deposited the answer in the post-office at Roxbury, properly enclosed and addressed to the plaintiff's attorney at his residence at Hobart, and paid the postage thereon, between which places there was a regular communication by mail. The letter enclosing the answer was deposited in the post-office about the hour of four, P. M., after the mail for that day had departed for Hobart. The mail for Hobart, in fact, left Roxbury at 10, A.M., the usual hour for its departure, and the answer was not in fact, received by the plaintiff's attorney until two days thereafter; and in the meantime the plaintiff's attorney had perfected his judgment and refused to receive the answer, and on a further application of the defendant's attorney, he insisted on retaining his judgment. Defendant now moves to have the same set aside.

A. C. COWLES, *for defendant.*

W. B. CHAMPLIN, Jr., *for plaintiff.*

MASON, Justice.—The answer in this case was served on the last day for serving, by depositing the same in the post-office, addressed to the plaintiff's attorney, and paying the postage thereon. The mail left Roxbury at 10 o'clock, A.M., of the day of service, and the answer was not mailed until 4 o'clock, P.M., of the day, and the answer was received two days thereafter by plaintiff's attorney, who had in the meantime entered a judgment against the defendant as for a default to answer; and the plaintiff's attorney refusing to receive the answer, or to vacate the judgment on the defendant's application, the defendant now moves upon affidavits to set aside the judgment, and for leave to serve his answer, if the service shall not be deemed good, and he presents also an affidavit of merits. The plaintiff's attorney insists upon the authority of the case of *Maher v. Comstocks*, (1 Howard's Pr. R. 87,) that the answer was served too late, and that the plaintiff was right, therefore, in insisting upon his judgment. It cannot be denied but that the case seems to favor the views taken by the plaintiff's attorney. The case decides, in short, that a plea deposited at 6 o'clock, P.M., in the post-office at Troy, on the last day for serving, addressed to the plaintiff's attorney at Albany, his place of residence, was not served in time; it appearing that the mail for Albany closed at 4, P.M. and departed at 5; and that the time of the closing and departing of the mail was notorious to all business men of Troy. I feel constrained to say in relation to that case, that I regard it as doubtful authority, and have not been able to ascertain upon what principle the case was decided. If the case was decided upon the ground that the service of a pleading on the



last day by depositing it in the post-office, must be served at all events, before the mail of that day departs, then I do not think the case should be followed, for in many places where mail services are made, the mail departs long before business men are out of their beds, and very many places, long before the business hours of opening attorney's offices. If the case, on the contrary, was decided upon the ground that the hour of closing and departing of the mail from Troy to Albany, being notorious, and at quite a late hour in the day, the court would regard a service made an hour after the mail had departed, as evidence of an intention on the part of the defendant's attorney to delay the receipt of the plea by the attorney for the plaintiff, until the evening of the next day, and thereby lead the attorney for the plaintiff into a default and the entry of judgment, then the case is not so objectionable; and in that case, there was no excuse offered in the papers, why the plea was not mailed before the departure of the mail. I should remark, however, in relation to that case, that it stands alone, and no reasons are assigned for the decision; and we are left, therefore, to conjecture alone upon what ground the case was decided; and I have not been able satisfactorily to reconcile it with some subsequent cases. It was decided in the case of *Brown v. Briggs*, (1 How. Pr. R. 152,) that the depositing of the plea in the post-office within the twenty days and paying the postage thereon, was good service, although the attorney to whom it was directed, did not receive it till after the twenty days had expired; and in the case of *Radcliff v. Van Benthuyzen*, (3 How. Pr. R. 67,) it was held that the depositing of a plea in the post-office within the twenty days was good service, although not received until eight days after the service, and a default which was entered in the meantime was set aside as irregular; and it was adjudged in the still later case of *Schenck v. McKie*, (4 How. Pr. R. 246,) on depositing the papers in the proper post-office, properly addressed, and paying postage, the service under the 410th section of the code was deemed complete, and that the party to whom it was addressed, took the risk of the failure of the mail. See also the case of *Jacobs v. Hooker*, (1 Barb. R. 71.) I do not entertain any doubt in this case, whatever may be said of the decision of the case of *Maher v. Comstocks*, *supra*, that under the present Code of Procedure, the service of the answer in the case under consideration was good, and made in time. The 409th section of the code fixes the service hours from six in the morning to nine in the evening; and the requirements of sections 410 and 411 of the code, were fully met by depositing the answer in the post-office, at the residence of the defendant's attorney, at the hour of 4, P.M. properly addressed, and paying the post-

age thereon, although the mail for that day had departed at 10, A. M. and although the answer was not received by the plaintiff's attorney until two days thereafter, as the papers showed, that there was a regular mail communication between the two places. This motion to set aside the judgment must therefore be granted; but as the plaintiff's attorney relied upon the authority of the case of *Maier v. Comstocks*, I am of opinion that the motion should be granted without costs, and the defendant may have ten days to serve his answer.

NOTE.—In this case, Mr. Justice MASON has undoubtedly taken the correct view of the case of *Maier v. Comstocks*, (1 Howard's Pr. R. 87.) That case stands alone, and has never been adopted as general authority. The reporter's recollection of that case is (it was not reported as fully as it should have been,) that he thought Chief Justice NELSON discovered, by the papers, a strong tendency on the part of one of the defendant's attorneys, to get some advantage, in the way of costs at least; and it appearing very evident that the service of the plea was *intentionally* delayed until after the mail had closed for the day, he decided to consider the plaintiff regular.

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## NEW YORK SUPERIOR COURT.

### LEGGETT vs. MOTT.

*Held*, that the practice in relation to reviewing reports of referees, is, to make a case and *appeal* from the judgment on the matters of *law* involved—or, apply for a stay of proceedings upon the report for the purpose of *moving for a rehearing* (on a case at special term.) The judge will exercise a discretion as to a stay, regulated by the nature of the action, the points to be raised, &c.; and may impose terms.

If the report be complained of as against *evidence*, there is no redress except by a motion for a rehearing. (*This is directly adverse to the case of Pepper v. Goulding, ante, p. 310.*)

Before OAKLEY, Chief Justice, and SANDFORD and PAINE, Justices.  
—May 29th, 1850.

C. NAGLE, for plaintiff.

A. L. BROWN, for defendant.

By the Court, SANDFORD, Justice.—In the case of *Haight v. Prince*, it was held by CAMPBELL, Justice, after consulting DUER and MASON, Justices, that a report of a referee upon the whole issue, might be brought before the special term on a motion for a rehearing; when such order might be made, granting or denying the application, as to the judge should seem just. (2 Code Rep. 97.) The question being presented in this case in our branch of the court, we have conferred with our associates,

(the six justices being present,) and it is the unanimous conclusion of the court, that the decision of CAMPBELL, J. was correct. Whether the court will look into the matters of law, as well as of fact, arising upon the report of the referee, and direct a rehearing in respect of erroneous rulings of the law, will, of course, be in the discretion of the court, at the special term. Where the report is complained of as being contrary to the evidence, an examination of the legal points involved will generally be convenient and proper in connection with the argument on the evidence. Where, however, the report is assailed in respect of its legal conclusions alone, the judge will be inclined to refuse a stay of proceedings with a view to a motion for a rehearing, and will leave the party to his remedy by appeal from the judgment.

The considerations which lead us to this result, will be briefly stated:

The amended code of 1849, allows of no appeal from a *judgment*, upon the facts involved. The appeal to the general term from a judgment, is limited to matters of law. (Am. Code, § 348.) This would cut off, entirely, any review of the finding of a referee upon the facts, or of the verdict of a jury, or the decision of a judge upon the facts, on a trial without a jury; unless there be some mode of reaching it, other than an appeal from the judgment. In *Droz v. Lakey*, we decided, in January last, that a motion to set aside a verdict as against evidence, might be made at the special term, on a case settled in the usual manner; and that such motion might be made after judgment, the party obtaining a stay of proceedings for the purpose. We see no good reason why the motion may not be made, without any formal case, before the judge who tried the suit, founded on his notes of the testimony.

As to the reports of referees, the code, it appears to us, is explicit in making a provision, independent of an appeal, in the first instance. Section 272, after providing that the report may be reviewed in like manner as the decision of the court on a trial, enacts that a *rehearing* may also be granted by the court.

A rehearing, as we understand it, is obtained on a motion only; and this is brought on before a judge, either at chambers or at special term. If it be for a new trial on the merits, it must be moved before the judge, *in court*; i. e. at the special term. (Amended Code, §§ 400, 401, and 350.)

We are referred to the 24th rule of the Supreme Court, adopted in August last, as imperatively restricting the examination of the reports of referees, to an appeal to be heard at the general term. As this rule, in the broad application claimed for it, would conflict with the latter part of

section 272 of the amended code, allowing a re-hearing; we think it was intended to apply, as in its literal terms it does apply, only to a review of the referee's report, for which purpose a case must be made; and as the appeal is limited to the law of the case, it follows that rule 24 applies only to a review of the report of a referee, on matters of law.

It is, nevertheless, a convenient practice to make a case on which to found a motion for a re-hearing, in the manner prescribed by the rule of the Supreme Court, and that course will be required in our court in future.

The practice, therefore, in respect of reports of referees, may be thus stated: The party deeming himself aggrieved by such a report, may prepare his case, and appeal from the judgment on the matters of law involved. Or he may apply to a judge of the court for an order to stay the proceedings on the referee's report, for the purpose of moving for a re-hearing. The judge will exercise a discretion, as to staying the proceedings, regulated by the nature of the action, the points proposed to be raised, and the danger of loss, if collection of the demand be delayed; and he may impose terms on granting a stay. If the report be complained of as against evidence, there is no redress except by the motion for a re-hearing. On obtaining a stay, the party must proceed to make and settle his case, and bring it on to be heard before the court at special term. An order will, thereupon be made, either granting or denying the motion for a re-hearing. From this order either party may appeal to the general term, as provided in section 349 of the amended code. And such appeals will be heard with other calendar causes, at the general term.

Rule accordingly.

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## SUPREME COURT.

### CHARLES M. LYNDE vs. TEUNIS T. COWENHOVEN.

Upon the trial of a question of fact by the court, the prevailing party, on filing the decision of the judge, may enter his judgment *immediately*, under § 267 of the code. There is no *implied* stay of proceedings, ten days, to make a case, under § 268.

The party desiring to make a case, must get an order to stay; and when the case is made and settled, it can be annexed to the judgment roll, and thereby constitute a part thereof as required by § 281.

*General Term, Second District. Argued Nov. 1489; decided Jan. 1850.—*Mr. Lott appeals from an order of Justice EDWARDS, setting aside plaintiff's judgment for irregularity, on the ground that the judgment was en-

tered up and roll filed within ten days after the decision of the justice to whom the question of fact was submitted for trial.

JOHN A. LOTT, *for plaintiff.*

J. E. BURRILL, Jr., *for defendant.*

By the Court, BARCULO, Justice.—We think the decision below is erroneous. We are unable to discover any irregularity in doing what is expressly authorized by the code. By section 267, the justice must file his decision with the clerk, and judgment upon the decision shall be entered accordingly. This clearly contemplates an immediate entry of judgment. The next section allows either party to make a case “within ten days after notice of the judgment.” Judgment may, therefore, be entered before a case is made.

But it is said that the roll cannot be filed until after the time for making a case has expired, because the roll is to contain the case, (§ 281.) It is true that the section enumerates the case as one of the papers to be attached and filed, as constituting the judgment roll. But that section also requires this to be done “immediately after entering the judgment,” which, of course, must ordinarily be before a case can be made. It seems to me that these sections give the prevailing party a clear right to have his judgment *entered up and roll filed immediately on the decision being made, unless his proceedings are stayed by an order for that purpose.* If a case is afterwards made, it must be attached to the roll when it is filed, and if the clerk should neglect to do it, the court will order it to be done. There is no hardship nor difficulty in this practice. If the case is made in good faith, the party can, ordinarily, obtain a stay of proceedings; and, if not, he ought not to have any. The prevailing party ought not to be delayed in collecting his judgments by any *implied stay of proceedings*, as must be the case, if the sections in question are construed to stay the judgment for ten days. The practice contended for by defendant's counsel, would lead to inconvenience, as it leaves it to the clerk to determine when the judgment is to be perfected. If the statute gives a stay of ten days to make a case, then, if a case is made and served within the ten days, it must operate as a further stay until it is settled. How is the clerk to know whether a case is made? And may he not irregularly file the judgment roll after the ten days?

The reasonable construction of the act gives the prevailing party his judgment on filing the decision, unless stayed by an order, leaving the party to make his case, and have it annexed to the roll.

We are happy to find that an eminent judge of the Superior Court of New York, entertains a similar view. In *Renouil v. Harris*, (2 Code Rep. 71,) Judge Oakley says, "the judgment is complete without the case, and where a case is made, it may, by order of the court, be annexed to the judgment record at any time."

The order appealed from must be reversed, with \$10 costs.

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### SUPREME COURT.

WILLIAM JAMES ST. JOHN, HENRY JOSEPH ST. JOHN and FERDINAND ST. JOHN, agt. WILLIAM WEST, and twelve other suits, by the same plaintiffs, against different defendants.

After the death of one of several plaintiffs, in an ejectment suit, a motion was made, (under § 121 of the code,) by the surviving plaintiffs at special term, to substitute the names of two individuals and the People of the State, to prosecute the suit, as representatives or successors in interest of the deceased plaintiff. It being a matter of doubt which of the three parties proposed was entitled to the right, the first being sole trustee under the will, it being doubtful whether he would take the title or only a power in trust, the second being an heir, but doubtful whether a citizen of the United States, and if neither of the two had the right, it was doubtful whether it did not pass by escheat to the People of the State. The motion was denied. An appeal was taken by the plaintiffs to the general term as required by section 9 of the "Act to facilitate the determination of existing suits," passed April 11, 1849.

The question was, whether the order appealed from *involved the merits* and could be appealed to the general term?

*Held* that it did *not* involve the merits, because the statute gives the right of continuing the suit in the name of the representative or successor in interest. In order to avail himself of this right, the party must show who is the successor. He must make out a *prima facie* case before the right attaches. This cannot be done by parties who claim in different characters.

Where it is a matter of doubt who are the successors, and different parties are proposed to be substituted to save the rights, it is a matter of discretion with the court, to allow or not, their substitution. The order thereon, of course, not appealable.

*It seems*, that the term successor, as used in the statute, does not include the People, when they claim by escheat. Theirs is a prior right which has become paramount by reason of the extinction of that upon which the action is founded.

(*The question, when may an order made at a special term, be said "to involve the merits?" discussed.*—SELDEN, Justice.)

*Monroe General Term, March, 1850.*—WELLES, JOHNSON and SELDEN, Justices. This is an appeal from an order made at a special term of this

court held in the county of Seneca, in October, 1849, denying an application on the part of the plaintiffs to substitute the names of Beverly Robinson, trustee under the will of William James St. John, John Henry Herbert St. John, and the People of the State of New York, as parties, plaintiffs, in place of the said William James St. John, who has died since the commencement of the suits.

The petition upon which the original motion was founded, among other things, shows:

That the thirteen suits are all actions of ejectment, brought to recover different lots of land in the town of Naples, Ontario county; parcels of a tract of about four thousand acres, alleged to have belonged to the late Lord Bolingbroke; and to have been conveyed by him to his five children, in joint tenancy; of whom the three plaintiffs above named, were the survivors.

That the suits were commenced prior to the year 1844, and were noticed for trial at the May circuit of that year, in Ontario county; at which the above entitled suit only was tried, a verdict having been obtained by the plaintiffs therein for a part of the lands claimed in that suit;

That exceptions were taken on the trial by both parties to the ruling of the court, and that before the other suits could be brought to trial, or the bill of exceptions be settled and argued, to wit: in March 1845, William James St. John, one of the plaintiffs, died, leaving the said John Henry Herbert St. John his only child;

That the deceased also left a will by which he devised all these lands to the said Beverly Robinson and one Philip Ricketts, their heirs, &c., as joint tenants, in trust, to sell and dispose of the same and distribute the proceeds as provided by said will;

That the said Ricketts died before the death of the testator, leaving the said Robinson sole trustee; but it is doubtful whether, under the provisions of the said will, the trustee would take the title to the said lands, or only a power in trust;

That the said William James St. John having been born in the city of New York, of alien parents, and having removed with his father at the early age of six or seven years to England, where he subsequently married a British subject, with whom he removed to, and resided in France, where the said John Henry Herbert St. John was born, it is doubtful whether the latter can be regarded as a citizen of the United States, and capable of inheriting the said estate; and that there being no other person known, to whom the said lands could descend, it is apprehended that the title may have passed by escheat, to the people of the state.

The object of the motion below, was to meet these several contingencies, by obtaining leave to add the names of the said Beverly Robinson, trustee of the said John Henry Herbert the son, and of the people of the state, as plaintiffs in appropriate counts, in place of that of the said William James St. John, deceased.

J. A. SPENCER, *for plaintiffs.*

B. D. NOXON, T. M. HOWELL, B. F. COOPER, *for defendants.*

By the Court, SELDEN, Justice.—Upon the argument of the appeal, among other grounds taken by the counsel for the defendants, it was insisted that the appeal should be dismissed for the reason that the order appealed from did not “involve the merits of the action” as required by section 9 of the “act to facilitate the determination of existing suits,” passed April, 11th 1849, under which the appeal was brought; and since this objection, if well taken, is fatal to the appeal, it may as well be first considered.

When, then, may an order made at special term be said to “involve the merits?”

The same phraseology being used in section 349 of the Code of Procedure, this question becomes one of great importance, as it determines the right of review in regard to a class of decisions extremely numerous, and frequently involving vast interests. It is a question of no little difficulty, as neither of the principal terms used have any very definite legal meaning; and yet, without giving to them some precise signification, no rational construction can be put upon the clause.

First, then: What is meant by the word “merits” as here used? If taken in its ordinary acceptance, it would mean the abstract justice of the case, without regard to any technical or arbitrary rules of law; but to give that signification to the word here, would in effect deny an appeal in many if not most cases where a fixed rule, or a well-settled principle of law had been violated, and allow it in those cases where a judge had been called upon to exercise a sound discretion in settling the equities of the parties, in regard to some interlocutory matter; thus reversing all the previous theory and practice of our courts. A better legal definition I apprehend, would be, to consider it as meaning the combined questions of law and of fact presented by the *pleadings* in the case. This, however, although perhaps the best general definition that can be given, is obviously defective, and will hardly do in the present case, as will hereafter appear.

Again: The precise meaning of the word “involve,” in this sentence, presents a difficulty scarcely less embarrassing. If considered as it might



be, without doing violence to language, as synonymous with the word *effect*, then it is apparent that the provision is a very broad one, giving a right of appeal, in many cases where it never existed before ; as it could easily be shown that many orders upon a mere matter of practice, or such as rest entirely upon the discretion or favor of the court, would have an effect more or less upon the ultimate disposition of the issues in the case ; as for instance, an order opening a default regularly taken.

On the other hand, if we give to the word "involve" its more exact and literal signification, as synonymous with comprise or embrace, the provision becomes extremely restricted and confined, and would have, if we adhere to the definition of the word merits given above, scarcely any practical operation whatever, as in that view it would only reach those few cases in which the order embraced, that is, disposed of, some part of the questions of law or of fact, presented by the pleadings in the cause.

To make the provision in question therefore accord at all, with those notions which long experience, and the practice of courts have heretofore settled as just and proper, it is obvious that some signification must be given to one or the other of the terms referred to, more or less variant from its most common and natural import.

The word merits, as a legal term, having acquired no precise technical meaning, clearly admits of some latitude of interpretation. Let it be understood, therefore, in the section of the statute under review, as meaning the strict legal rights of the parties, as contradistinguished from those mere questions of practice which every court regulates for itself, and from all matters which depend upon the *discretion* or *favor* of the court, and we have not only a rational but an exact and well-defined construction of the provision in question. It would then give an appeal from every order which involved, that is, passed upon and determined any positive legal right of either party, and deny it in all other cases. This is the construction which will inevitably be generally given in practice to this provision ; and by adopting it as the true interpretation of the language, much fluctuation in the decisions of our courts in regard to appeals from this class of orders, may, it is believed, be avoided.

Did the order appealed from in this case then involve the merits ?

For the purpose of disposing of this question I shall assume that the case is to be governed by the 121st section of the code, and that a motion to continue the suit in the name of the representatives of the deceased plaintiff might properly be made under that section at any time within a year after the code took effect ; the death of the party having occurred prior to

its passage, and no proceedings to continue, by *scire facias*, having been commenced before the code was passed.

The action referred to provides that no action shall abate by the death of any party ; but that in case of such death the court, on motion at any time within a year thereafter, or afterwards, on supplemental complaint, "may allow the action to be continued by or against his personal representatives or successors in interest." The right of continuing the suit, given by this section, is to be regarded, in my judgment, as an absolute right, and one which the courts have no discretion to refuse in a case coming fairly within the scope of the provision. It follows, therefore, that an appeal would lie from an order denying an application made for the single purpose of enforcing this right.

But in this case the motion was threefold : to substitute the names of the heir of the deceased, the trustee under the will, and of the people of the state.

The defendant insists that, conceding that the statutory provisions referred to would authorize the substitution of the names of the heir and trustee, it does not extend to the people, and consequently so far as that branch of the motion is concerned, it must be regarded as an application to amend the declaration by adding a new party ; and as addressed to the *discretion* of the court, and therefore not appealable.

To this it is answered, that in case of an escheat, the people in respect to the ownership of the property, succeed directly to the deceased proprietor ; that they and the last owner bear to each other the relation strictly of predecessor and successor, and consequently by the express terms of the section, the people have the same right to be substituted as the heir. Is this a sound interpretation of the statute ? The object of the provision is to prevent the abatement of a suit, where the same rights which the suit is brought to enforce, continue ; and where nothing is changed but the person in whom the right is vested. But do the people of the state in case of an escheat succeed to the rights of the last proprietor ? Is their title the same, to be deduced through the same channels, and supported by the same evidence ? Manifestly not. Theirs is a prior right which has become paramount by reason of the extinction of that upon which the action was founded. It cannot be said in any sense that they derive their title from the last owner. His was secondary and derivative ; theirs original and primary. My conclusion therefore is, that the term successor, as used in the statute, does not include the people when they claim by escheat ; and that even if it would be proper in any case to allow them to be joined as plaintiffs in the same suit with private persons, for the benefit of the latter, the ap-

plication for such a privilege must be considered as asking a favor of the court, and not as matter of strict right.

This branch of the motion, therefore, if it stood alone, could not, upon the principles already settled, be brought here by appeal.

But there is another objection which goes to the whole appeal. The statute gives the right of continuing the suit in the name of the representative or successor in interest. In order to avail himself of this right, the party must show who is the successor. He must take out a *prima facie* case before the right attaches. This certainly he cannot do in two persons not claiming in the same character.

He may, as is assumed to have been done here, make a case of doubt which of the two is entitled to the right. But does this give to either the right, under the statute, of being substituted in the suit? Clearly not. The person to whom the title has passed, being ascertained, the statute gives to him the right of prosecuting the suit, and to no other. It gives no right of experimenting as to the proper party. It was decided in the case of *Boynton v. Hoyt*, (1 Denio, 50,) that a party claiming to be substituted under the corresponding provisions of the Revised Statutes, must show himself *prima facie* to have succeeded to the title. The applicants here have not asked that the court should determine upon the facts presented, which of the three parties has succeeded, and to substitute such party. This, perhaps, they might have done: but they ask to be permitted to include two persons who are conceded to be without title. It may be proper in many cases to avoid a multiplicity of suits, or to save a right from the operation of a statute of limitations, that the court should permit, in a case of doubt, a number of names to be used; but this is clearly not a matter of strict right but a question of discretion, and therefore not appealable.

This conclusion being decisive of the case, it becomes unnecessary to examine either of the other questions raised upon the argument.

The appeal must be dismissed.

## SUPREME COURT.

IRA BENTLEY vs. WILLIAM L. JONES et al.

A decision of the court upon a demurrer is not an order, but a *judgment*.

Where there are several issues of law and fact, an appeal does not lie until the final determination of all of them.

Nor does an appeal lie from the judgment until it is entered and perfected. The time for appealing begins to run on service of notice of the entering of the judgment.

*Albany General Term, Feb. 1850.—Before Justices WATSON, PARKER and WRIGHT.* A demurrer had been interposed to a part of a reply. On argument before Mr. Justice HARRIS, at special term, judgment was given for the defendant, with leave to the plaintiff to amend on payment of costs. The remaining issue of fact was undecided. Within the time limited for amending, the plaintiff appealed from the judgment on the demurrer. The defendants moved to dismiss the appeal, on the ground that judgment had not been perfected at the time of the appeal.

H. P. HUNT, *for defendants.*

J. HOLMES, *for plaintiff.*

By the Court, PARKER, Justice.—The first question presented is, whether the decision was an *order* and might be appealed from as such, under section 349 of the code.

Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order, (§ 400.) A judgment is the final determination of the rights of the parties in the action, (§ 245.) In the language of the code, the argument of the demurrer was a trial. A trial is the judicial examination of issues, whether they be of law or of fact, (§§ 252, 255.) And issues of law must be first tried, unless the court otherwise direct, (§ 251.) The adjudication on the demurrer was final, and after the expiration of the time for amending, if no amendment was made, it would authorize the entry and perfecting of judgment. The distinction clearly made in the code is this. An order is the decision of a motion. A judgment is the decision of a trial. It is plain, therefore, that the decision in question was a judgment and not an order, and that an appeal from it, as an order, could not be made.

It remains to consider whether the plaintiff had a right to appeal from it as a judgment when the appeal was entered. Must the appeal be made from the decision or from the judgment, when perfected?

The English statute requires the writ of error to be sued out within a limited time after *judgment signed* or *entered of record*, (2 Tidd, 1064.)

By the Revised Statutes of this state, (5 R. S. 594, § 21,) all writs of error upon any judgment or final determination, rendered in any cause in any court of law and of record in this state, were required to be brought within two years after the rendering of such judgment or final determination, and not after." It was said in *Fleet v. Youngs*, (11 Wend. 522,) that it was evident from the change of language made use of in our statute, that it was the intention that the time of limitation should commence running from the date of the decision, and not from the entering of the record, as in England; and it was accordingly held that the limitation of two years began to run from the entry of the rule for judgment, and not from the time of filing the record. So in *Lee v. Tillotson*, (4 Hill, 27,) it was decided that the "final determination," of the court, from which the party desired to bring error to reverse a judgment rendered on a report of referees, dated from the time when the motion to set aside the report was actually decided. The plaintiff claims that a similar construction is to be given to the code; and that the time for appealing began to run on serving notice of the decision made at special term. Whether this is a correct position, depends upon the language and provisions of the code. The language of the code more nearly resembles that of the English statutes than the Revised Statutes, under which the above cited decisions were made.

The appeal in question was given by section 348 of the code, which authorizes an appeal to be "taken to the general term from a judgment entered upon the direction of a single judge of the same court. The appeal must be taken within thirty days after written notice of the judgment, (§ 332.) All judgments are in the first instance to be entered on the direction of a single judge, or report of referees, subject to review at the general term, (§ 278;) and the clerk is required to keep, among the records of the court, a book for the entry of judgments, to be called the "judgment book," (§ 279.) Section 280 declares that the judgment shall be entered in the judgment book, and shall specify clearly the relief granted or other determination of the action. Unless a judgment roll is furnished, the clerk, immediately after entering the judgment, is to make up and file the judgment roll, (§ 281.) And on filing the judgment roll, the judgment may be docketed, (§ 282.) Again, section 311 requires the clerk to insert in the entry of judgment on the application of the prevailing party, upon two days' notice, the sum of the charges for costs, &c.; and by section 310, he is also to compute and add to the costs the interest on a verdict or report for the recovery of money, until judgment be finally entered.

The appeal is to be entered in the same manner as if it were an appeal

from an inferior court (§ 348;) and on perfecting an appeal from an inferior court the clerk is required to transmit to the appellate court a certified copy of the notice of appeal and of the judgment roll, (§ 328.)

These provisions leave, I think, no doubt that the judgment is not to be considered as *entered* until it is *perfected*. It is not the rule, in the minutes made at the special term, from which the party appeals, but the judgment entered in the judgment book and perfected. The entry in the judgment book, and the making up and filing of the judgment roll, are simultaneous acts; for it is the duty of the clerk to make up and file the judgment roll immediately on entering the judgment in the judgment book.

The judgment cannot be entered till the costs are ascertained, for the costs are to be inserted in the entry of judgment, (§ 311.) This construction enables the party appealing to ascertain the amount of damages and costs, and to draw his undertaking in accordance with the directions of section 335.

On appeal from a judgment the court may review any intermediate order involving the merits and necessarily affecting the judgment, (§329.)

It will frequently happen, as in this case, that there are several issues of law and of fact, joined in one action. The issues of law are first argued and decided, with leave to amend. The party succeeding on the demurrer, may fail on the issues of fact, and judgment may be given against him on the whole record. In such case, an appeal from the decision on the demurrer would be unnecessary. It cannot be intended that an appeal will lie to the final determination of all the issues in the suit.

The motion to dismiss must therefore be granted; but, the question being a new one, without costs.

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## SUPREME COURT.

CORNELIUS DAVENPORT agt. HIRAM LUDLOW.

The amount of a *verdict* rendered in an action of assault and battery, cannot be paid to the sheriff, on an execution against the party who recovered the verdict, under section 293 of the code. A verdict in *tort* must be consummated by *judgment* before it can be treated as an *indebtedness* under that section.

*It seems*, that under the code, an attorney cannot claim a lien for costs upon a judgment. That part of the Revised Statutes which heretofore regulated that subject is repealed.

*Tompkins Special Term, June 1850.*—This was a motion, made to set aside an execution issued against the defendant, under the following circumstances. The plaintiff recovered a verdict against the defendant in an action of assault and battery, for thirty dollars, on the 18th of April, 1850, and the judgment was perfected on the 26th of the same month for the damages and thirty dollars costs. On the 22d day of April, 1850, the defendant paid over to the sheriff sixty dollars on an execution in his hands against the present plaintiff, in favor of one Herrick, and took the sheriff's receipt therefor, under the provisions of section 293 of the code. The plaintiff assigned the judgment in this cause to his attorneys, and they issued the execution in question.

J. D. BEERS, *for the motion.*

W. V. BRUYN, *contra.*

SHANKLAND, Justice.—The 293d section of the code enacts, that after the issuing of execution against property, any person *indebted* to the judgment debtor, may pay to the sheriff the amount of his *debt*, or so much thereof as shall be necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge for the amount so paid." The plaintiff's attorneys interpose two objections to the motion: *First*, that they have a lien for their costs to the amount of thirty dollars, which cannot be affected by the payment made by the defendant to the sheriff; and *Second*, that at the date of the payment, the demand had not become a *debt*, so as to admit of payment within the meaning of that section of the code.

I think it quite doubtful, whether the attorney can claim a lien for costs on a judgment recovered under the code. Formerly the costs, as between party and party was the measure of compensation between attorney and client; and the courts protected the attorney to the extent of those costs, from the fraudulent acts of the parties, in attempting to deprive him of them. But by the provisions of the code (§ 303,) all statutes establishing or regulating the costs or fees of attorneys, and all existing rules of law restricting or controlling the right of a party to agree with an attorney for his compensation, are repealed; and the measure of compensation is left to the express or implied agreement of the parties; and the costs now allowed to be recovered of the losing party are given to the prevailing party by way of indemnity for his expenses in the action. Since the adoption of these provisions, the costs recovered of the opposite party are no longer the measure of compensation of the attorney. He has nothing to do with them. In the absence of an express agreement the attorney now recovers what he reasonably deserves to have for his services. It may be *more*, or *less* than the costs taxed against the opposite party. I am

inclined to the opinion that the attorney's supposed lien for costs, cannot be urged as a hindrance to the payment of a judgment, on an execution against a plaintiff, according to the 293d section of the code.

But the second objection to the granting of this motion must prevail. At the time the payment was made to the sheriff no judgment had been obtained in this action of tort. The verdict had been rendered on the 18th of April, but no record had been filed, and whether a judgment would ever be rendered was uncertain. A verdict is only a step towards the judgment; the progress of the suit may still be stopped after verdict, by arrest of judgment, or the granting a new trial.

It is true, that after the lapse of four days from the verdict, the clerk may enter judgment final, unless the court order otherwise. But in this case the four days had not expired after verdict, and before the payment was made. In the matter of John Charles, a bankrupt, (14 East. Rep. 197,) it was held that a verdict, in an action for a breach of a marriage promise, was not a *debt* on which a commission of bankruptcy could be founded; that it was not a *debt* until consummated by judgment. In *Crouch v. Gridley*, (6 Hill's Rep. 250,) it was held that the defendant's liability for a *tort* is not affected by his discharge under the bankrupt law, unless before the petition of bankruptcy was presented, the demand had become a *debt* by being converted into a judgment; and that the verdict of a jury, or report of referees, merely liquidated the damages, but did not change their character, until judgment perfected therein. I therefore decide, that the defendant, in an action of assault and battery, cannot pay the amount of the recovery against him, on an execution against the plaintiff, in pursuance of the 293d section of the code, until the recovery is consummated by a judgment. This motion is denied with seven dollars costs.

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## SUPREME COURT.

JOHN KELLOGG agt. CHARLES CHURCH.

Where a defendant denied the whole of plaintiff's complaint, (which was for taking sundry articles of personal property,) by alleging generally that he "*denies each and every allegation alleged in said complaint.*" Held sufficient, and, a complete denial to the whole of the complaint.

*Montgomery Special Term, June 10, 1850.*—Plaintiff complained for the wrongful taking and conversion of sundry articles of personal property, comprising a numerous list of small articles.



Defendant answered as follows:

*"Above named defendant answers to the complaint of plaintiff in the above entitled action, and denies each and every allegation alleged in plaintiff's complaint."*

B. F. CHAPMAN, *for plaintiff*, insisted that this was not a sufficient denial of the complaint and demanded judgment, notwithstanding the answer, and cited section 149 of the code, also section 168.

D. D. WALRATH, *contra*.

CADY, Justice.—I think such an answer will do. It would be intolerable to require specific denials of an entire complaint in other terms. I will not aid in establishing the intricate and voluminous system of pleading under the code, which seems to be growing up in practice. I cannot believe that it was the design of the code-makers; and, until my position is overruled by the Supreme Court, in bench, I shall hold such a denial as this good.

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## SUPREME COURT.

CHARLES M. DAVIS *agt.* THOMAS W. JONES.

THE SAME *agt.* THOMAS W. JONES and others.

Where a defendant omitted, within the prescribed time, to admit service of a summons and complaint, deposited by the plaintiff with a justice of the peace in pursuance of § 56 of the code; and upon the plaintiff bringing an action upon the undertaking of the defendant deposited with the justice; the defendant moved for leave to admit service of the summons and complaint, and to stay plaintiff's proceedings on the undertaking; *held*, that this court had no power to grant such relief. There was no action pending until the *service* of the summons, (§ 139.) Consequently the court had no jurisdiction.

*Rensselaer Special Term, December, 1849.*—Motion for leave to the defendants, in each of the above actions, to admit service of the summons and complaint therein, deposited with a justice of the peace, under the provisions of the 56th section of the code.

In October, 1849, the plaintiff brought two actions against the defendants in these suits respectively, before a justice of the peace of the town of Poestenkill, in the county of Rensselaer. The cause of action stated in the complaint, in each of said actions, was that the defendants had unlawfully entered the plaintiff's close and carried away his grain, apples, &c.

The defendants in their respective answers, set forth matters showing that the title to lands would come in question upon the trial. They also delivered to the justice the undertakings, required by the 56th section of the code, and thereupon the justice discontinued the actions. Within thirty days thereafter, the plaintiff deposited with the justice a summons and complaint in each of the above actions. The defendants, supposing they were entitled to ten days after they should receive notice of the deposit of the summons and complaint with the justice, within which they might give an admission of service, omitted to give such admission until the time prescribed by the statute for that purpose had expired. Upon being informed that the time allowed for that purpose had expired, the defendants applied to the plaintiff and proposed to give admission of service, and, as they allege, offered to put in their answers forthwith, and to pay all the costs which had then accrued. This offer was refused, and actions were brought before the justice upon the undertakings. The defendants, upon affidavits showing these facts, moved for leave to admit service of the summons and complaint, in each action, and to answer the same; and that the plaintiff may be restrained from proceeding in the actions brought upon the undertakings.

J. HOLMES, *for plaintiff.*

C. H. DENTON, *for defendants.*

HARRIS, Justice.—The defendant's counsel relies upon the provisions of the 173d section of the code, as authorizing the relief he seeks. That section does, indeed, vest in the court a very ample discretion in relieving a party from the consequences of his own mistake, inadvertence, surprise, or excusable neglect. Under the operation of the salutary provisions of that section, the instances are now, happily, rare, in which a party can claim a *vested right* in an omission or blunder of his adversary. When satisfied that it will tend to the furtherance of justice, the court is called upon, in the spirit with which this section was enacted, to relieve the party from the consequences of his own error, in a matter of mere practice, upon such terms as shall be just. But in this case, I regret to find that I have no power to relieve the defendants from the consequences of their own misapprehension of the law. This court has no jurisdiction over the proceeding. There is no suit pending here. The 139th section of the code declares that, from the time of the service of the summons in a civil action, the court shall be deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. Here, it is obvious, there has been no such commencement of an action as will give the court

jurisdiction over the proceedings. Had I the power, I should regard it a proper case for granting relief upon terms. But there is no action pending in this court; and, of course, there are no proceedings for this court to control. The motion must, therefore, be denied; but, under the circumstances, it must be without costs.

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### SUPREME COURT.

#### JOSEPH O. HASBROUCK vs. ROBERT M'ADAM.

A change of the place of trial is not effected by the defendant's merely serving a demand in writing that the trial be had in the proper county under § 126 of the code. If such demand is made for the trial in the proper county, and the plaintiff neglects to procure the change accordingly, the defendant may avail himself of the omission, on the trial, by application for a dismissal of the complaint.

To change the place of trial, application must be made to the court by one party or the other, and either may make it.

*New York Special Term, April 20, 1850.*—On an affidavit that younger issues had been tried at the King's circuit, defendant moved that complaint be dismissed. On the part of the plaintiff, it was shown that the place of trial designated in the complaint was the county of New York. To this the defendant answered that in due time after the service of the complaint, he had demanded in writing that the cause be tried in the county of Kings, where both parties reside.

Q. M'ADAM, *for defendant*, insisted that the service of the demand of itself changed the place of trial.

A. CRIST, *contra*, denied that the defendant had a right, by his own act, and without any action of the court, to change the place of trial.

EDMONDS, Justice, observed that many of the profession had supposed that the service of such a demand, under section 126 of the code, of itself worked a change in the place of trial, where the county designated for that purpose in the complaint is not the proper county. But this was a mistake. The effect and object of that section is to allow the cause to be tried in the county designated in the complaint, though neither of the parties reside there, unless the defendant shall serve a demand in writing that the trial be had in the proper county, and in case such demand be served, the defendant may, on the trial, avail himself of the objection. So that where such demand is served, the plaintiff must change

the place of trial to the proper county, or be in danger of having his complaint dismissed on the trial. But to change the place of trial, application must be made to the court, by one party or the other, and either party may do it, but the defendant cannot by the mere service of a demand, change it.

The necessity of an application to the court, is quite apparent; for suppose the plaintiff resides in one county, the defendant in another, and the place of trial is designated in a third; into which the two proper counties is the place of trial to be changed? And so, if there are several defendants residing in different counties, which defendant is to have the choice?

The whole thing is subject to the power of the court to change the place of trial under section 125, and its power must be invoked. The defendant by his own act cannot change it.

This motion must, therefore, be denied; but as the notice is broad enough, the defendant may have the place of trial changed to the proper county if he desires it.

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## SUPREME COURT.

### THE VILLAGE OF COHOES agt. THE COHOES COMPANY.

Villages incorporated under the act of December 7, 1847, may raise a tax at *any time*, in conformity with the provisions of that act. Their assessors, within sixty days from the time the vote is taken to raise the tax, must complete and deliver their tax list. They are not limited to the 1st of May and September, in each year, in making the assessment, &c., as required under the general tax law.

*Rensselaer Special Term, Dec. 1849.*—This was a motion by the plaintiffs for judgment, on account of the frivolousness of the demurrer to the complaint. The facts stated in the complaint, and the grounds of demurrer, sufficiently appear in the opinion of the court.

J. K. PORTER, *for plaintiffs.*

S. G. HUNTINGTON, *for defendants.*

HARRIS, Justice.—This action was brought to recover of the defendants a village tax, assessed upon them, to the amount of \$1440.10. The complaint alleges that the plaintiffs are a village, incorporated on the 3d of July, 1848, under the provisions of the act relative to the incorporation of villages, passed December 7, 1847; that the defendants are

also an incorporation created by an act of the Legislature; that at a special meeting of the electors of the village, duly notified and held, on the 27th day of September, 1848, the trustees were directed to raise by tax certain sums for specified objects, and that the final vote, in respect to raising each and every such specific sum, was taken separately; that, in pursuance of the resolution of the electors, the trustees caused a tax of \$3409.56 to be assessed upon the taxable property, liable to be assessed for taxes in the village, according to the provisions of the act aforesaid, by the assessors of the village, that an assessment roll was made out in due form and delivered to the trustees, with the requisite certificate attached; and on the 14th of November, 1848, the trustees delivered the assessment roll, or tax list, to the collector, with their warrant for the collection thereof; that the collector made his return, in the manner prescribed by law, stating that he had not collected the tax assessed upon the defendants, by reason of his being unable to find the property out of which he could collect the same, within the time specified in the warrant.

I do not deem it necessary to notice in detail the numerous objections taken in the demurrer to the sufficiency of the allegations in the complaint. It is enough upon this branch of the case, to say, that I think these grounds of demurrer are not well taken. The statement of the incorporation of the plaintiffs and the defendants; the direction to levy a tax, and the proceedings to carry that direction into effect, is clearly sufficient to constitute the complaint a good pleading, within the principles of the code. The real question presented by the demurrer is, whether the trustees had legal authority to levy and collect the tax, at the time and manner they did. That the tax was ordered in the manner prescribed by the 28th section of the act relative to the incorporation of villages, is sufficiently alleged. It also sufficiently appears that the purposes for which the tax was to be levied were among those enumerated in the same section. But it is insisted, that the assessment could only be made between the first days of May and July; and inasmuch as it appears that the assessment in this case, was in fact made after that time, it is unauthorized by law, and all the proceedings upon it are, for that reason, illegal and void.

It is true, that the act from which the plaintiffs derive their authority, declares that all taxes voted to be raised in a village incorporated under its provisions, shall be assessed and collected in conformity, as far as practicable, with the provisions of law in respect to the assessment and collection of taxes by town assessors and collectors, (Session Laws, 1847,)

page 539, § 33.) By these provisions, I understand that it was intended that the village assessors are to be governed by the general laws of the state, in relation to the assessment and collection of taxes, in determining whether property is or is not taxable; and if taxable, what is the amount, or quantity and value thereof, and to whom it is to be assessed. So, too, the collector is to take for his guide, in the discharge of his duty, the provisions of law in respect to town collectors. But there are some provisions of law, in respect to the duties of town assessors and collectors, which cannot be regarded as applicable to the same officers in village corporations. Among these is that which requires assessors, between the first days of May and July, to ascertain by diligent inquiry the names of taxable inhabitants, and all the taxable property; also, that which requires them to complete their assessment-roll by the first day of August, and after an opportunity for review has been had, that they deliver the assessment-roll to the supervisor by the first day of September. Instead of following these directions, village assessors are required to make out and complete their assessment, and to deliver the same to the trustees "*within sixty days after the meeting at which such tax was directed to be raised.*" (Session Laws 1847, page 547, § 59.) If the defendant's counsel is right in the construction for which he contends, it must follow that the electors of a village could not legally vote to raise a tax at any period of the year except that which would enable the assessors to perform their duty between the first days of May and July, and, at the same time, within sixty days from the time the tax was ordered. I am satisfied that no such thing was intended by the Legislature. The persons qualified by the 32d section of the act to vote upon the question, may at any time, in conformity with the provisions of the act, vote to raise the tax. Within sixty days from the time of such vote, the assessors must complete and deliver their tax list. In discharging this duty, they are to follow, as nearly as they can, the provisions of law relating to the assessment and collection of taxes in the several towns and wards of this state.

I think, therefore, that the demurrer is not well taken; and that the motion for judgment should be granted with costs. The defendants, however, should be permitted to answer the complaint within ten days, upon payment of the costs of this motion.

## SUPREME COURT.

BETSEY TIPPEL agt. HENRY TIPPEL.

*Held*, that under § 114 of the code, the wife may properly bring a suit *alone*, (without a next friend,) against her husband, for a limited divorce for cruel treatment.

*It seems* that in all cases between herself and husband (if not an infant,) she may sue alone, under that section, without a next friend. (*This is adverse to Coit v. Coit, ante, p. 232.*)

*Otsego Special Term, April 1850.*—This was an action brought by the wife against her husband for limited divorce on the ground of cruel treatment.

A. BECKER, *for the defendant*, moved to set aside the summons and complaint, on the ground that the plaintiff should have sued by her next friend; and relied on the case of *Coit agt. Coit*, (Howard's Pr. Rep. vol. 4, page 232, and cases there cited.)

BURDITT, *for plaintiff*.

MONSON, Justice.—The Chancery Rule 163, published in 1844, required that a *feme covert*, in a bill filed for a limited divorce, should prosecute by a responsible person, as her next friend. The like provision is contained in the Supreme Court Rule 111, of 1847. But in the late rules, as published in 1849, this clause is omitted. (See Rule 68, and note.) No rule of court, therefore, exists, requiring the plaintiff in this action to sue by a next friend.

Before the code, a *feme covert* might sue without a next friend in the case of a bill filed for an absolute divorce for adultery; and Ch. J. Savage and several eminent lawyers and senators also held that she might sue without a next friend, for a limited divorce. Still, a majority of the court in the case of *Wood v. Wood*, (8 Wend. 370,) held that in the latter case a next friend was necessary; and for the reason mainly that the 2 R. S. 144, § 39, provides that "a bill of divorce may be exhibited by a wife in her own name as well as by her husband;" while, in the article treating of limited divorces, (2 R. S. 146, § 50,) the phrase "*in her own name*," is omitted; and partly, perhaps, that the chancellor, in the exercise of sufficient authority, had established the rule aforesaid.

By the code as amended, (§ 114,) "when a married woman is a party her husband must be joined with her, except that,

1. When the action concerns her separate property, she may sue alone.

2. When the action is between herself and her husband, she may sue

or be sued alone; and the next section provides that when an infant is a party, he must appear by guardian.

Now this would seem to be plain enough to "enable a person of common understanding to know what is intended." It seems to be conceded that a *feme covert* may sue without a next friend, in the case of an absolute divorce for adultery. But the language of the code is the same in both cases.

The construction attempted to be put upon the code is, that the phrase "she may sue alone," means only without joining her husband. The second subdivision before referred to would then read thus: the wife may sue her husband alone, without joining her husband, or she may be sued by her husband alone without joining her husband; a reading which, I think, is not justly chargeable upon the code.

I am clearly of opinion that this action is regularly brought, and the motion is therefore denied.

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## SUPREME COURT.

WILLIAM H. RUSSELL agt. JOHN CLAPP.

An answer which alleged "that the plaintiff who prosecutes the action, is not the real party in interest therein, nor is he an executor or administrator, or a trustee of an express trust, or a person expressly authorized by statute to sue without joining with him the person for whose benefit the suit is prosecuted," *held* bad on demurrer, for the reason that it did not state the facts upon which the defendant relied to sustain his allegation that the plaintiff had no right to sue.

*Rensselaer Special Term, Dec. 1849.*—Demurrer to answer. The complaint states that the plaintiff, on the 5th day of January, 1847, recovered against the defendant in a Court of Common Pleas, held at Boston, in the state of Massachusetts, a judgment for \$4031.09, which remains unreversed and unsatisfied, and demands judgment for the amount of the judgment with interest. The defendant answers "that the plaintiff who prosecutes this action is not the real party in interest therein, nor is he an executor or administrator, or a trustee of an express trust, or a person expressly authorized by statute to sue without joining with him the person for whose benefit the suit is prosecuted." To this answer the plaintiff demurred, stating as the ground of demurrer, "that the defendant does not state and set forth in his said answer, the name of the real



interest in said action, or in whose name the action ought to have been prosecuted."

S. G. HUNTINGTON, *for plaintiff*.

G. STOW, *for defendant*.

HARRIS, Justice.—The radical change which the code has made in the rules by which the sufficiency of a pleading is to be determined, is well stated by Mr. Justice SILL, in *Glenny v. Hitchins*, (4 Howard, 98.) Under the present system, it is intended to confine the pleadings to a simple statement of facts; neither the evidence by which the facts alleged are to be established, nor the legal conclusions to be derived from such facts can properly be stated. A complaint is sufficient if it contains a simple statement of facts, which, if proved, will entitle the plaintiff to judgment. The answer, in like manner, is sufficient if it deny generally all the facts stated in the complaint, or specifically any particular fact stated, so as to form an issue of fact upon the matters of the complaint, or, admitting the facts stated in the complaint to be true, if it state other facts which, if proved, will countervail the legal effect of the facts alleged in the complaint and admitted to be true, and show that, notwithstanding the truth of such facts, the defendant, and not the plaintiff, is entitled to judgment. Thus, in the case of *Glenny v. Hitchins*, above cited, it was enough for the plaintiff to allege the sale and delivery of the goods. These facts established, the obligation of the purchaser to pay for them is the conclusion of the law upon these facts. If the goods had been sold by a third person to the defendant, it would have been necessary for the plaintiff further to state in his complaint that the vendor had assigned the demand to him, or that the vendor having died, he had been appointed his executor or administrator, or some other facts from which the legal inference could be drawn that he, and not the vendor, was *the real party in interest*. It clearly would not be sufficient for the plaintiff to state generally, the sale and delivery of the goods by a third person to the defendant, and then allege, as a reason for bringing the action in his name, instead of that of the vendor, that the plaintiff, and not the vendor, was *the real party in interest*. The facts which, if proved, would authorize the court to adjudge him to be the real party in interest, must be stated. So, I apprehend, if the defendant would avoid the plaintiff's right to recover by showing that some other person, and not the plaintiff, is the real party in interest, he must state in his answer such facts, as when established by proof, will enable the court to say, as matter of law, that the plaintiff is not the real party in interest.

Suppose an issue of fact had been formed by a reply to the answer, in which the plaintiff had alleged that he was, in fact, the real party in interest. Upon the trial of such an issue, it would be necessary for the defendant, in order to maintain his side of the issue to prove a state of facts, such as an assignment of the judgment executed by the plaintiff since its recovery, or a transfer of his interest by operation of law, from which he could ask the court to determine that the plaintiff was not the real party in interest. Those facts, whatever they may be, upon which the defendant relies as the ground upon which he will ask that it should be adjudged that the plaintiff is not the real party in interest, should have constituted the matter of allegation in his answer. This I understand to be in accordance with the theory of pleading adopted by the code. Each party should present in his pleadings the facts which he intends to establish by proof, if controverted, and upon which he expects the law to be pronounced. These facts should be so presented that upon the trial the court can see from the pleadings what facts are disputed and what are not; and be able to proceed to the determination, first of the disputed facts and then of the rights of the parties as established.

My conclusion, therefore is, that the answer is insufficient, for the reason that it does not state the facts upon which the defendant relies to sustain his allegation that the plaintiff has no right to sue. The plaintiff is therefore entitled to judgment upon the demurrer, but as the answer was probably interposed in good faith, the defendant may have leave to amend within ten days after notice of this decision, upon payment of costs.

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## SUPREME COURT.

STEPHEN BURROWS vs. ABRAHAM B. MILLER, and two other suits.

A person who had formerly been a resident of another state (Indiana,) but had with his family removed to this state, and was then residing with a relative, while he was looking out for an opportunity to engage in business, and whether he should finally settle in this state or elsewhere, was undetermined, *Held*, that an attachment was properly issued against him, under § 227 of the code, as a *non-resident*.

*New York General Term, May, 1850.—Before EDMONDS, EDWARDS and MITCHELL, Justices.* In this and two other cases, attachments were taken out against the defendant as a non-resident. It appeared that he had formerly resided and married in this state, and had then emigrated to

Indiana, where he had been engaged in mercantile business in which he had failed. After his failure he had returned to this state with his family, and lived in his father-in-law's family in the city of New York, while he was looking out for an opportunity of again getting into business; and whether he should finally settle in this state or elsewhere, was undetermined.

On this state of facts he moved to discharge the attachment, on the ground that he was not a resident of Indiana, but, if anywhere, of this state. From an order at special term, denying the motion, he appealed.

By the Court, EDMONDS, Presiding Justice.—I am of opinion that the decision of the special term in these cases, was eminently proper. The question is not whether the defendant is a resident of Indiana, but whether he is not a resident in this state. The provision of the code (§ 227,) authorizes an attachment "against a defendant who is not a resident of this state." The defendant was, at one time, a resident of Indiana; but that residence he has abandoned, and he has returned with his family to this state, but whether he will take up his residence here or elsewhere; he is yet undetermined; that is to depend upon his prospects of getting into business. Until his mind shall be settled on that point, until he shall come to a determination and have a fixed place of habitation, with an intention of staying there, he cannot be said to have a residence anywhere. Order of special term affirmed with costs.

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## SUPREME COURT.

REUBEN DEDERICK agt. HENRY HOYSRADT and others.

An *injunction* cannot now be issued in one action to stay the prosecution of another in this court.

If the commencement or pendency of one suit furnishes a reason for staying proceedings in another, an application should be made for a stay of proceedings,

And such application should be made in the suit in which proceedings are sought to be stayed; and upon notice, where the defendant has answered.

*At chambers, Dec. 27, 1849.*—This was a motion to vacate an injunction which had been granted by the county judge of Columbia. On the 4th day of January, 1839, Henry Hoysradt and Adam A. Hoysradt executed their bond to Aaron Vanderpoel, conditioned for the payment of \$2500 with interest; and to secure the payment, John H. Hoysradt and

Sarah his wife, executed a mortgage upon their interest in a certain farm in Kinderhook. On the first of November, 1840, Vanderpoel assigned the bond and mortgage to William H. Reynolds, by whom it is still held. At the time of the execution of the mortgage, Henry Hoysradt was the owner, in his own right, of the one undivided third of the farm, and in right of his wife of another undivided third, subject to the right of dower therein of Anna Maria Hoysradt, the wife of John H. Hoysradt, and late the widow of Adam Shoemaker, who died seized of the whole of the farm. On the 18th of July, 1843, a decree in partition was made by which the share of Henry Hoysradt and his wife, in the farm was set off to them subject to the right of dower aforesaid.

On the first of November, 1848, Henry Hoysradt executed his bond to Theodore R. Timby, conditioned for the payment of \$7000, and at the same time to secure the payment thereof executed, with his wife, a mortgage upon the premises, which had been allotted to him in the partition. On the 22d day of June, 1849, the plaintiff in this action became the assignee of the last mentioned bond and mortgage.

About the 1st of November, 1849, Reynolds commenced an action by summons and complaint, for the foreclosure of his mortgage, in which the plaintiff in this action was made a defendant. Reynolds being absent from the country, the plaintiff, on the 24th of November, called on Tobey & Reynolds, his attorneys, and tendered to them, on his behalf, the amount due on the mortgage and the costs of the suit, and demanded an assignment of the bond and mortgage, and consented to take such assignment from the attorneys at his own risk, and without any personal responsibility, and also to waive the liability of Adam A. Hoysradt on the bond. He also offered, if the attorneys would suspend the action, to deposit the amount with them, or give them any security they should require, if they would procure from Reynolds an assignment of the bond and mortgage. Various other propositions of a similar character were made to the attorneys of Reynolds; all which were declined by them, for the reason that they had no authority from Reynolds, except to collect for him the amount due upon the bond and mortgage. The plaintiff thereupon commenced this action, stating these facts in his complaint, and praying that William H. Reynolds, and his agents, attorneys and counsellors, might be restrained from further prosecuting his action for the foreclosure of his mortgage, and for the foreclosure of his own mortgage, and that the plaintiff be permitted to redeem the mortgage of Reynolds, and also for relief in other particulars. Upon this complaint the injunction was granted restraining Reynolds and his attorneys from further proceedings in the action for the foreclosure of his mortgage. A

motion was now made upon affidavits, on behalf of Reynolds, to vacate the injunction. Affidavits were read in opposition to the motion, but the facts as above stated are not materially varied by the affidavits.

J. GAUL, Jr., *for plaintiff*.

J. H. REYNOLDS, *for defendant W. H. Reynolds*.

HARRIS, Justice.—The only ground upon which Courts of Equity have ever interfered with proceedings in other courts, by allowing an injunction, is that equitable circumstances have existed, cognizable only in a Court of Equity, which rendered it unconscientious for the party enjoined to proceed in a court which had no power to grant the relief which the justice of the case demanded. This ground of jurisdiction can never exist when the proceedings sought to be arrested are in the same court to which application is made for the injunction. No instance can be found, in which a Court of Equity has interfered, by its writ of injunction, issued in one suit, to stay proceedings in another suit pending in the same court, unless such court, like the present Supreme Court, before the adoption of the code, exercised both common law and equity powers, as distinct and independent jurisdictions, (*Dyckman v. Kernochan*, 2 Paige, 26 ; 1 Hoffman's Pr. 89 ; 1 Clarke, 307.) The proper practice in such cases is, to apply to the court for an order staying proceedings in the action. Since the distinction between actions at law and suits in equity has been abolished, so that in an action to enforce a strictly legal right a defence purely equitable may be interposed, I am not aware that any case can occur, in which it would be proper to interfere by injunction to stay proceedings. The commencement or pendency of one suit may furnish a reason for staying proceedings in another suit ; but, if so, the application should be made in the suit in which the proceedings are to be stayed. In analogy to the former practice, which gave a defendant, who had appeared, a right to be heard before an injunction was granted against him ; and the provision of the 221st section of the code, which prohibits the granting of an injunction against a defendant who has answered, without notice, the plaintiff would be entitled to notice of an application to stay his proceedings. For these reasons I think the injunction was improperly allowed in this case, and it must be set aside with costs of the motion.

But as the plaintiff has made a case which would probably entitle him to have the proceedings of Reynolds, in his action for the foreclosure of his mortgage stayed until he can bring this action to trial, upon such terms as shall be deemed equitable, the motion must be granted without prejudice to the plaintiff's right to move for such stay in that action.

## SUPREME COURT.

AARON LUCAS vs. THE TRUSTEES OF THE 2D BAPTIST CHURCH AND  
SOCIETY of the village of Geneva.

A motion to set aside a judgment, upon matters of substance, (not for mere technical irregularity,) is not required to be made the first possible opportunity.

An official statute certificate of a copy of a paper or document, signed by a *deputy clerk*, without stating or appearing that the *clerk was absent*, is valid. The legal presumption is, that the deputy has done his duty, and that the clerk was absent when the certificate was signed.

A slight variance between the original and copies of papers served, not calculated to mislead, will not avoid. So *held*, where the letters "L. S." were omitted in the copy; the original having a seal.

Where a summons was issued against a corporation by its *corporate name*, under the Revised Statutes, (before the code,) and served on the secretary; and subsequently a declaration was issued against each of the *trustees by name*, and served on each, without any reference in it to a suit having been commenced by summons, *held*, that the defendant's attorney was authorized to treat them as separate and distinct suits. The plaintiff's attorney having *verbally* informed defendant's attorney that but one suit was to be commenced did not obviate the difficulty.

*Ontario Special Term, Sept. 1847.*—This was an action of ejectment which was commenced by summons returnable January 16, 1847.

On the 15th January, 1847, the summons was served on George Lincoln, secretary of the corporation. On or about the same day, the attorney for the plaintiff served *on each of the trustees* of this society a copy of declaration, the title of which was of January term generally. The copies of declaration were not entitled in the cause commenced by summons, and there was no reference whatever in the declaration to its being in a suit commenced by summons. The declaration is commenced as follows: "Ontario county, ss.: Aaron Lucas, by John C. Strong his attorney, complains of Edward Johnson, Jason Jeffrey, George Lincoln, Thomas Nobles, Thomas Lee, John Brown, and John Dixon, Trustees, &c. of the Second Baptist Church and Society of the village of Geneva, a religious corporation under and by virtue of an act, &c." (reciting the several acts authorizing the incorporation of religious societies,) "*by declaration and notice, according to the Revised Statutes.*" Then, after describing the premises and stating the plaintiff's seizure, the declaration proceeds as follows: "And he, the said Aaron Lucas, being so possessed thereof, the said Edward Johnson, Jason Jeffrey, George Lincoln, Tho-

mas Nobles, Thomas Lee, John Brown, and John Dixon, trustees as aforesaid, afterwards, to-wit, on, &c. entered and ejected the plaintiff, &c." The notice to plead, annexed to the copies of declaration, was directed "to Messrs. Edward Johnson, Jason Jeffrey, George Lincoln, Thomas Nobles, Thomas Lee, John Brown, and John Dixon, trustees, &c. you are hereby notified, &c." The defendants' attorney treated the causes as if two suits had been commenced, and soon after the service of the summons and the copies of the declaration, the defendants' attorney served a notice of appearance for the corporation in the suit commenced by summons, on the plaintiff's attorney, and at the same time served a notice of retainer for each of the persons named as trustees in the suit which he claimed was commenced by declaration. The plaintiff's attorney soon thereafter informed the defendants' attorney that but one suit had been commenced, and that the summons and declaration were process and pleadings in the same suit. The defendants' attorney replied that there were two suits, and that he should so regard them; that an oral statement of any notice or agreement between the attorneys was by the rules of the court invalid, and could not, therefore, be relied upon or used; and that, if the plaintiff's attorney would give him a *written* notice or stipulation that he did not intend to commence but one suit, and would state in such notice which suit he would elect to stand by, he would receive the same and would act upon it. Plaintiff's attorney replied that he thought he would give such notice. The defendants' attorney not having received such notice, on the 8d February pleaded to the declaration, and at the same time served a notice on the plaintiff's attorney, requiring him to declare in the cause commenced by summons, before the end of the next term of the court, or that judgment of discontinuance would be entered. On the 2d June, the May term of the Supreme Court having ended, and no copy declaration having been served pursuant to the notice, the defendants' attorney entered judgment of discontinuance for costs. The defendants also produced the original certificate of incorporation, which showed that the corporation was correctly described in the summons.

A motion is now made to set aside the judgment of discontinuance, perfected in the suit commenced by summons.

The defendants claim that the motion should have been made at the general term, and the plaintiff is guilty of laches. The defendants also objected to the reading of a certified copy of the docket of the judgment, because it was certified by the deputy clerk, and it did not appear that

the clerk was absent from his office, and because the letters "L. S." for the place of the seal, are not in the copy of the papers served.

J. C. STRONG, *for plaintiff*.

C. J. FOLGER, *for defendants*.

HOYT, Justice.—The papers and notice of motion were served on the 6th of August last. At that time it could hardly be expected that the profession could have learned that a rule had been adopted that such motions could be heard at general terms, as the rules at that time had not been published. The motion is not to set aside the judgment for a mere *technical irregularity*, but if the defendants have been irregular, they would not now be entitled to the judgment they have perfected. It is not a case in which the plaintiff would be bound to move the first possible opportunity. I think the plaintiff is not guilty of laches in not moving earlier.

The second objection is not well founded. The presumption is that the deputy clerk has done his duty, and that the clerk was absent when the certificate was made. The court will not presume that the deputy has violated his duty.

The third objection is equally untenable. A slight variance in the original and copies of papers served, not calculated to mislead, will not avoid. The defendants in this case could not have been prejudiced or misled by the omission of the letters L. S. in the copy of the papers served.

But as to the *merits* of the motion; I am satisfied that the summons was against the corporation, by its proper corporate name, and precisely as it is described in the original certificate of incorporation. But the declaration on its face is not against the corporation by its *proper corporate name*; and there is no reference in it to a suit having been commenced by summons. On its face it purports to have been prepared for the original commencement of the suit, "*by declaration and notice according to the Revised Statutes, &c.*" clearly intimating or averring that the suit was commenced by declaration. If it was designed to have been against the corporation, it should not have proceeded against the trustees *by name*, but should have used the *corporate name as set forth in the summons*. There was no necessity for serving a copy of declaration in a suit commenced by summons, *on each* of the individual trustees; and it was not necessary, but improper *to name them* in the declaration. I think the defendants' attorney was correct in regarding the addition of the words "trustees, &c." to the names of Edward Johnson and the others, as a mere



*descriptio personarum.* (6 Hill, 240; 24 Wend. 345; 9 J. R. 334; 8 Cow. R. 31.)

The defendants had a right to treat the proceedings by declaration as a separate and distinct suit from the one mentioned in the summons. The proceedings of the defendants have therefore been regular.

The motion must be denied, with \$10 costs of opposing.

NOTE.—This case should have been reported before, but by accident got mislaid. Most of the points in it, however, are of general and practical application under the present, as well as the former system of practice.

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### SUPREME COURT.

ALANSON HINDS agt. AUSTIN MYERS, JACOB RANKINS and JEREMIAH ROBINSON.

Where three defendants were sued in an action of assault and battery, and appeared separately and defended by different attorneys, a verdict rendered against one of them, and the other two acquitted; *Held*, that under sections 304 and 305 of the code, the defendants acquitted were entitled to costs against the plaintiff. Section 306 was held to refer to equity causes of action as formerly understood.

*Fulton County Circuit and Special Term, May 21, 1850.*—This was an action for an assault and battery. It was tried at Herkimer circuit in April last. The plaintiff recovered a verdict against Robinson of \$25 damages; but the defendants Myers and Rankins had a verdict of not guilty. The defendants appeared by different attorneys, and pleaded separately. The plaintiff's attorneys served a copy of a bill of charges and disbursements on the attorneys of the defendants, with a notice of application to the clerk of Herkimer county for the adjustment thereof. The attorneys of the defendants each served a copy of a bill of charges and disbursements, with notice of application to the same clerk at the same time, for their adjustment and insertion in the judgment roll in favor of their respective clients.

On the day appointed, the attorneys of the respective parties appeared before the clerk, and after the costs against Robinson had been adjusted, the counter bills were presented for adjustment, to which the plaintiff's attorneys objected, on the following grounds:

1. The plaintiff was entitled to costs in the action, and, therefore, the defendants could not be allowed to recover costs in the same action. (Code, § 305.)

2. The defendants have not obtained any order from the court allowing them to recover costs in the action, (Code, § 306.)

The county clerk sustained the objections, and refused the defendants' application, and permitted the plaintiff's attorneys to perfect their judgment against Robinson for his damages and costs.

The defendants made a motion in the nature of an appeal, at the Fulton county circuit for an order requiring the clerk of Herkimer county to adjust, on proper notice, their charges and disbursements, and to correct the judgment roll by adding thereto a judgment in their favor for the amount.

E. S. CAPRON, *for the motion*, insisted that his clients were the prevailing party," within the meaning of section 303 of the code, as between themselves and the plaintiff; that section 305 was to be construed together with section 303, and to be read thus: "Costs shall be allowed of course to the defendant *in the actions* mentioned in the last section, unless the plaintiff be entitled to costs therein," *against such prevailing defendant*; that section 306 referred "to *other actions*" than those referred to in section 304, which includes only actions at law, and therefore no order of the court was necessary for the defendants in this case.

L. FORD, *opposed*, insisted upon the same points made before the county clerk; and also, that the words, "in other actions," contained in section 306, refer to all actions in which there are several defendants, some of whom have a verdict in their favor on the trial and without reference to the character of the action as legal, or equitable. He also insisted that the motion for an order allowing the defendants' costs, if necessary, should have been made at the coming in of the verdict, at the trial.

WILLARD, Justice, decided substantially, that although the code had abolished the distinction of the forms of action which formerly existed, and had provided that all causes of action should be instituted in one form, yet, for the purposes of costs at least, it had recognized the character of actions as formerly understood. It was so in section 304; all the causes of action therein enumerated were, under the old order of legal proceedings, actions at law. Section 305 referred to them only, and was to be interpreted as if it read thus: "Costs shall be allowed, of course, to the *defendant* in the actions mentioned in the last sections, unless the plaintiff be entitled to costs therein," *against him*. He held that the words, "other actions," contained in section 306, referred to other causes of action than those enumerated in section 304; and there being no other than equity causes of action, the former action referred to such only.

Ordered accordingly, that the motion be granted, but without costs thereof to either party.

## SUPREME COURT.

## JAMES WALDORPH vs. CATHARINE BORTLE.

An action brought against a sole defendant, to recover the possession of land, may be continued, after the death of the defendant intestate, against his heir-at-law claiming to have succeeded to his legal rights and to own the land.

An action to recover real property, should be brought against the person in the actual occupation or possession of the premises; but it is now proper in such action to add as defendants, all persons who have or claim an interest in the controversy, adverse to the plaintiff.

*Columbia Special Term, June 1850.*—This was a suit brought to recover possession of real estate, situated in the county of Columbia, being virtually an action of ejectment. After an answer was put in, the cause being ready for trial, the defendant died, intestate, on 7th December, 1849, leaving Jane, wife of William Chadwick, Helen Bortle, Elizabeth Bortle, and Eve Maria Bortle, her only children, and heirs-at-law; all of whom were over 21 years of age, and resided in the county of Columbia, and claim the premises for the recovery of which said action was brought.

On an affidavit, setting forth the above stated facts, the plaintiff moved that the action be continued against the heirs-at-law above named. Copies of the affidavit and notice of the motion were served on all the heirs-at-law proposed to be made parties.

E. R. COWLES, *for plaintiff.*

C. P. COLLIER, *for defendant.*

PARKER, Justice.—At common law the action died with the party, (*James v. Bennett*, 10 Wend. 540.) The Revised Statutes (3 R. S. 404, 3d ed. § 33) provided that the action of ejectment, should not be abated by the death of any plaintiff, or of one of several defendants, after issue and before verdict or judgment, and authorized proceedings to substitute the names of those who might have succeeded to the plaintiff's title; and in case of the death of one of the defendants, the cause might proceed against the other defendants. Such proceedings were by *scire facias*, (*Boynton v. Hoyt*, 1 Denio, 53; 2 R. S. 483, 396.) The Revised Statutes did not go so far as to continue a suit against the heirs of a sole defendant in ejectment, who died before verdict or judgment.

But the provisions of the code are much broader. Section 121 provides that no action shall abate by the death, marriage, or other disability of a party, if the cause of action survive or continue. In case of death, marriage or other disability of a party, the court, on motion, at any time

within one year thereafter, or afterwards, on a supplemental complaint, may allow the action to be continued *by* or *against* his representative or successor in interest. It will be seen that this provision extends to both parties and to every stage of the action.

The plaintiff is therefore entitled to his motion, "if the cause of action survive or continue."

It is not shown by the moving party that the defendants have succeeded to, and are in the possession of the land in question; nor does it appear who is in possession, or whether the premises are actually occupied. It is set forth that the heirs-at-law claim the premises for which the action was brought. Under our late practice, when the premises were actually occupied, the action of ejectment could only be brought against the person in possession. It was only where the premises were not so occupied, that the action might be brought against some person exercising acts of ownership over the premises claimed, or claiming title thereto, or some interest therein, (2 R. S. 400.) And though the person in actual occupation was a mere servant of the person claiming to be owner, it was held he must be made defendant instead of his principal, (*Shaver v. McGraw*, 12 Wend. 558.) If this rule as to parties is still in force, then it does not appear that the heirs above named are proper parties to be made defendants; because it is not shown that they have succeeded to the possession. The plaintiff could not have recovered against them at law under the former practice in the action of ejectment, on the facts now presented.

But I think the rule as to making parties defendant in an action to recover possession of land, is now changed. Section 118 of the code provides "that any person may be made defendant, who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination, or settlement of the questions involved therein." This is applicable to every civil action, including as well cases in which the remedy would formerly have been at law, as those in equity, such distinction being now abolished, (Code, § 69.) The practice in all actions is now, therefore, the same as in our late Court of Chancery: and I see no reason why, in an action to recover possession of land, all persons claiming title to, or an interest in the property, may not now be made defendants, as well as the persons in actual possession.

I think it is, therefore, sufficiently shown that the heirs-at-law, claiming title, may properly be made defendants. They have succeeded to the legal rights of the original defendant. If there is a third person in the actual occupation of the premises, he ought also to be made a defendant; but that is not the question now presented.

The plaintiff now makes parties defendant at his peril; the court being authorized to award costs to such defendants as have judgment in their favor or any of them, (Code, § 306.)

The motion must be granted, with \$10 costs of motion, to abide the event of the suit.

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### SUPREME COURT.

AARON COOKE agt. GIDEON D. PASSAGE.

The 38th section of 2 Revised Statutes, page 309, authorizes the court to vacate a judgment in ejectment and grant a new trial, &c., on certain terms. *Held*, that the same section applies to a judgment in an action to recover the possession of real estate under the code.

*Allegany Special Term, April, 1850.—Motion for new trial.* The plaintiff brought an action under the code, to recover the possession of real estate contracted to be sold by him to the defendant, alleging that the defendant had failed to comply with the conditions of his contract of purchase. The defendant denied the breach of the agreement, and had a verdict in his favor.

The plaintiff now asks that the judgment on the verdict be vacated and a new trial granted; or for such other relief, &c., and cites Revised Statutes, vol. 2, page 309, § 88, relating to the action of ejectment, as follows: "The court in which such judgment shall be rendered, at any time within three years thereafter, upon the application of the party against whom the same was rendered, his heirs and assigns, and upon payment of all costs and damages recovered thereby, shall vacate such judgment, and grant a new trial in such cause."

The defendant objected that the judgment had not yet been perfected, and that the statute cited did not apply to an action under the code.

E. FAULKNER, *for plaintiff.*

J. A. VANDERLIP, *for defendant.*

MARVIN, Justice.—*Held*, that the section of the Revised Statutes was applicable to such an action under the code, and ordered that the plaintiff be allowed to perfect the judgment upon the verdict unless the defendant does so in ten days; and that when perfected the judgment shall thereupon be vacated and a new trial granted, without further order of court.

## SUPREME COURT.

CORNELIUS ECKERSON, Respondent, agt. DAVID SPOOR et al., Appellants.

Where an appeal is dismissed with "costs on the appeal and costs of motion," the respondent is not at liberty to issue a *fiery facias* to collect such costs until their amount has been liquidated by or under the direction of the court.

Nor can a *fiery facias* be regularly issued in such case, till steps have been taken to bring the party into contempt.

Where an appeal from a county court was placed on the general term calendar of this court, on the notice of the appellant and not reached, and when reached at a subsequent term the court refused to hear it, "on the ground that an appeal did not lie from such a decision, and subsequently dismissed the appeal with costs on the appeal and costs of motion," it was held on adjusting the amount of costs, that the appellant could not object to the term fee of \$10, for the term at which the cause was not reached.

Held, also, that the term fee could not be charged for the term when the court refused to hear it, the cause having been reached and not postponed.

*Schoharie Special Term, June, 1850.*—This was an appeal from the County Court of Schoharie. The cause was noticed and put on the calendar by both parties, at the general terms of this court, held in September and November, 1849, but not reached. It was again noticed by both parties and placed on the calendar at the last February general term. When reached, it appeared that the appeal was from a decision of the county judge, reversing a judgment of a justice of the peace, and ordering a new trial; and the court refused to hear the appeal, holding that no appeal could lie from such a decision. Afterwards, at a special term, held on the last Tuesday of March, on a motion made to dismiss such appeal, it was "Ordered, that the appeal in this cause be dismissed with costs to the respondent on the appeal, and ten dollars costs of this motion."

In May following, the plaintiff issued an execution to collect \$55 costs of such appeal and motion. The costs had not been adjusted by any taxation, nor had any demand of payment been made.

The defendants now moved to set aside an execution as irregular, or for some rule reducing or liquidating the amount.

The defendants also moved to set aside an execution issued in this court for the collection of \$10, the amount of costs awarded by the county judge on the reversal of the justice's judgment. It appeared by the plaintiff's affidavits, that in filling up a blank printed for executions in

this court, the attorney had inadvertently neglected to strike out the title of this court and insert that of the county court.

J. H. RAMSAY, *for defendants*.

T. SMITH, *for plaintiff*, contended that under the code he was entitled, by the language of the rule, dismissing the appeal, to \$15 costs of the appeal, and three term fees of \$10 each, as well as \$10 costs of the motion. That no taxation could be necessary, as there was now no taxing officer, the clerk only being authorized to adjust the costs when judgment was entered.

PARKER, Justice.—The plaintiff is clearly wrong in having proceeded to issue execution to collect a sum of money that has never been ascertained, either by the court or by one of its officers, and which the defendants have never been adjudged to pay. A party can in no case tax his own costs, and proceed to collect them by execution: nor can an execution be issued, in any case, unless the amount in dollars and cents has first been adjudged by the court. In case of final judgment, the judgment-roll is the foundation for the execution; and in case of interlocutory costs, or costs ordered to be paid on motion, the amount should be ascertained and stated in the order of the court, and execution awarded, (*People v. Nevins*, 1 Hill, 158.)

The plaintiff's counsel claims to have acted under the act of 1847, (Session Laws of 1847, page 49.) That statute abolishes imprisonment for the "non-payment of interlocutory costs, or for contempt of court in not paying costs," and substitutes process in the nature of a *fiery facias* for the collection of such costs.

The costs awarded in this case cannot properly be called interlocutory costs; "costs are either interlocutory or final; the former arising on interlocutory matters in the course of the suit; the latter depending on its final event," (Gr. Pr. 714.) Here the rule awarding costs of the appeal and of the motion, was the final determination of the appeal. The same view was taken by Justice WELLES, in *Buzard v. Gros*, (4 How. Pr. R. 23.)

If the plaintiff is entitled to a *fiery facias* by the act of 1847, it is under the other clause, viz: "for contempt of court, in not paying costs." But here no steps have been taken to bring the defendants into contempt; there has been no liquidation nor taxation; no service of the rule and bill of costs, and no demand of payment, nor any order of the court founded on proof of a refusal to comply with the previous order, (2 R. S. 3d ed., 624, § 4; *Lorton v. Seaman*, 9 Paige, 609.) The defendants are cer-

tainly not in contempt. The statute only substitutes a *feri facias* for a precept in the nature of an attachment. It does not dispense with the preliminary steps.

In any view that can be taken, the issuing of the *feri facias* was unauthorized and irregular, and it must be set aside.

There is certainly some embarrassment under our present practice in saying how costs in such cases are to be adjusted. No authority is conferred upon the clerk by the code, except in cases of final judgment (§ 311,) though I suppose the court may confer such authority on the clerk by providing specially in the order for a reference to him. I think, however, it is the better way in all cases, where costs are awarded on motion, to specify the amount in the order. This must necessarily be done with regard to the costs of the motion itself, (§ 315.) In this case, the amount "of costs on the appeal" could have been easily ascertained and inserted in the order, when counsel on both sides were present.

As it may save another application to this court, I proceed now to fix upon the amount of costs to which the plaintiff was entitled under the order.

The words "costs on the appeal," cover not only the item of \$15, allowed on appeal before argument, but also ten dollars for every term at which the cause was necessarily on the calendar and not reached, or was postponed. (Code, § 307.)

These last items are, however, objected to on the ground that the cause was not *necessarily* on the calendar. The cause was noticed at each term by both parties, and the defendants ought not to object that the plaintiff's counsel should be paid for attending on their, the defendants', notice. The cause was regularly on the calendar, and I think the defendants are not in a situation to say it was *unnecessarily* there, when it was put there by themselves. But this fee of \$10 is only chargeable when the cause is not reached, or is postponed. It is shown that the cause was not reached at the September and November terms; and for these, the charges may properly be made. But the cause was reached at the February term, and was not postponed. It was not to be heard at a future time. The court refused to hear it, and nothing further was ever done in regard to it at the general term. The language of the statute does not cover such a case, and the term fee is not, therefore, properly chargeable for the February term. The plaintiff was, therefore, entitled to but \$45 for costs "on the appeal and costs of motion," and this liquidation may be included in the order entered on the decision of this motion.

The execution issued for \$10 was also irregular, and must be set aside.



It is not sustained by any judgment or order of this court. No leave can be given here to amend it. The power to give that leave belongs to the county court which rendered the judgment, and from which it was intended to be issued.

The motion is therefore granted, with \$10 costs, which sum may be deducted from the costs due to the respondent.

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### COURT OF APPEALS.

JAMES C. DUANE, Respondent, agt. THE NORTHERN RAILROAD COMPANY, Appellants.

An appeal will not lie to this court from an order of Supreme Court, at general term, reversing a judgment obtained at the circuit, and ordering a new trial.

*June Term, 1850.*—Duane sued the railroad company under the code, and at the circuit there was a verdict and judgment for the defendants. The plaintiff appealed to the Supreme Court in general term, where the judgment was reversed, and a new trial ordered. The defendants then appealed to this court.

GEORGE F. COMSTOCK, for the respondents, moved to dismiss the appeal, on the ground that the judgment was not final, and therefore an appeal would not lie. He cited the code, § 11, 245, 280, 281, 327, 328.

N. HILL, Jr., for the appellant, cited the code, § 264, 265, 348, 330, 11. (*Van Santvoord v. Tousey*, 6 Hill, 157; *Jackson v. Walker*, id. 261.)

BRONSON, Ch. J.—There may be an appeal from “a judgment” (Code, § 11,) which, in the language of the code, “is the final determination of the rights of the parties in an action.” (§ 245.) We think this is not such a final judgment as comes within the definition.

Motion granted.

## COURT OF APPEALS.

*Decisions, April Term, 1848, at the City Hall in the City of New York.*

CORNELIA DODGE, appellant, vs. RALPH MANNING and others, respondents.—*Decree of the Chancellor modified.* N. HILL, Jr., for appellant; M. T. REYNOLDS, for respondents.

This was a case involving the construction of a will in regard to the charge and lien of a legacy, and the time when, and by whom it should be paid. (Reported, 1 Comstock, 298.)

THE MUTUAL INSURANCE COMPANY of the city and county of Albany, plaintiffs in error, vs. NICHOLAS CONOVER, defendant in error.—*Judgment affirmed.* R. W. PECKHAM, for plaintiffs in error; M. T. REYNOLDS, for defendant in error.

This was a question as to the authority of the secretary of an insurance company to give a written consent to the assured to assign his interest in the policy, &c. Also a question, as to a bill of exceptions in reviewing the decision of a circuit judge, disregarding a variance between the declaration and proof. (Reported, 1 Comstock, 290.)

JOSEPH SLOCUM, appellant, vs. JOSEPH P. MOSHER and ISAAC CLASSON, respondents.—*Decree of the Chancellor affirmed.* D. L. SEYMOUR, for appellant; SAMUEL STEVENS, for respondents.

This was a bill filed by Slocum for the specific performance of a written, sealed agreement, made between Classon and Slocum, and executed by Classon, for the sale of Classon's share of a farm, (undivided,) owned by him and Mosher together. The answer set up a prior parol agreement by Classon, to convey the same premises to Mosher, and a part performance of it by payment, by Mosher, as a part of the consideration, from time to time, to Classon, of some five hundred dollars in money, and the acceptance by Classon of a deed to Mosher, which he said he intended to sign when he reached Mosher's residence—Classon residing in St. Louis. Also, that Slocum, with others, induced Classon, while on his way to Mosher's, to sign the agreement, by false representations, and taking advantage of his intemperate habits, &c. Subsequent to the execution of the written agreement, Classon did execute an absolute conveyance to Mosher, which was recorded. It was a question of fact; as to which the chancellor remarked, "that he concurred with the vice-chancellor in his conclusion that the contract, of which a specific performance is sought, was unfairly obtained; and that a court of equity ought not to enforce its performance as against either of the defendants. But if the complainant has any claims whatever, against

the defendant Classon, he should be left to his remedy at law." (Not reported.)

ROBERT REYNOLDS, plaintiff in error, vs. HENRY H. MYNARD and others, trustees, &c., defendants in error.—*Judgment affirmed.* C. B. DUTCHER, for plaintiff in error; HENRY HOGEBOM, for defendants in error.

This was an action commenced before a justice of the peace to recover for services of plaintiff's son as teacher of a district school; he having obtained a certificate of qualification, and kept some three months when he was discharged by two of the trustees, after a district meeting held, for alleged improper conduct. He was hired by the trustees for four months, and was paid for the time which he actually kept. And this suit was brought for damages in the breach of the contract. The plaintiff recovered judgment before the justice, which was affirmed on certiorari in the Common Pleas. It was reversed by the Supreme Court, and the latter judgment affirmed in this court. There were several points taken on the argument. One was, that the justice had no jurisdiction; and the plaintiffs should have been non-suited, because the evidence showed that the county superintendent of common schools had on an appeal to him by two of the trustees, given his decision in writing, that the teacher should be discharged, and paid only for the time he had actually kept the school. (Cited Decision of Superintendent, 1841, page 180; 11 Wend. R. 90.) That it was a case within the provisions of the act of April 20, 1830, (1 R. S. 481.) That the deputy superintendent had the same power as the superintendent in such a case. (Session Laws, 1841, page 236.) That teachers were presumed to make their contracts with full knowledge of the law. (Decision of Superintendent, 1837, pages 101-2.) The application for a non-suit on this ground, was overruled by the justice; and his decision seems to have been sustained throughout, as no allusion is made to it in the opinion of the Supreme Court.

The Supreme Court reversed the judgment of the Common Pleas on a single point, as appears from their opinion; that was, that two individuals who were inhabitants of the district, had went to school, and were liable to taxation to raise funds to discharge teacher's wages, but who had not actually paid their assessment, were offered as witnesses by the defendant, and rejected by the justice on the ground of *interest*. It was held, that their interest did not *disqualify* them; it went to affect their *credit* only. (Not reported.)

SIMON SHINLER, plaintiff in error, vs. ISAAC HOUSTON, defendant in error.—*Judgment reversed with a venire de novo by the Supreme Court; costs to abide the event.* G. STOW and N. HILL, Jr., for plaintiff in error; J. A. SPENCER and J. D. WILLARD, for defendant in error.

This was a question of what constitutes a sale and delivery under the statute of cumbrous articles, (a pile of lumber.) (Reported, 1 Comstock, 261.)

CHAUNCEY DEXTER and another, plaintiffs in error, vs. AMOS ADAMS, sheriff, &c., defendant in error.—*Judgment affirmed with double costs.* G. WHEATON, for plaintiffs in error; N. HILL, Jr., for defendant in error.

This was a question of the liability of a sheriff for an escape from the jail limits; where it appeared that the prisoner was induced to go off the limits by means of deception and misrepresentation, (a false message sent to him by an officer having an execution against him on another judgment.) (Reported, 2 Denio, 646.)

JOHN ROWLAND, plaintiff in error, vs. GEORGE K. FULLER, defendant in error.—*Judgment affirmed.* N. KING, for plaintiff in error; HENRY FULLER, for defendant in error.

This was a special demurrer to a declaration. The declaration was for injuries to the plaintiff's premises in plowing up and subverting the soil lying open in the highway opposite to and in front of his lots, &c. The declaration was very singularly drawn; it commenced in an action of *trespass*, the allegations of the injuries and the termination was in *case*. The demurrer was sustained. (Not reported.)

ERASTUS SPARROW, plaintiff in error, vs. ELIZABETH KINGMAN, defendant in error.—*Judgment reversed, with a venire de novo by the Supreme Court; costs to abide the event.* H. S. DODGE, for plaintiff in error; N. HILL, Jr., for defendant in error.

This was a case deciding that a *quit claim deed*, from the husband, did not estop his grantee, or one holding under him, from showing that the husband was not seized of such an estate as entitled his widow to dower. (Reported, 1 Comstock, 242.)

REUBEN MATTISON, plaintiff in error, vs. DANIEL BAUCUS, defendant in error.—*Judgment affirmed.* T. C. RIPLEY, for plaintiff in error; J. PIERSON, for defendant in error.

This was a question as to the interest of a mortgagor in personal property. That his interest, even before forfeiture, where he has not the right of possession for a definite period, is not the subject of levy and sale upon execution. (Reported, 1 Comstock 295.)

ROYAL VILAS and another, appellants, vs. TIMOTHY JONES and another, respondents.—*Decree affirmed.* SAMUEL STEVENS for appellants; JAMES EDWARDS for respondents.

This was a decision that a court of equity would not relieve a party, sureties, on a promissory note, after a judgment at law, in which they had failed to sustain the defence of usury. Also, whether a mere surety was a borrower within the meaning of the usury act of 1837.

JAMES FUNCK, and others, plaintiffs in error, vs. JEAN JACQUES MERIAN and others, defendants in error.—*Judgment affirmed.* This was a cause submitted upon printed arguments and points. M. R. ZABRISKIE, for plaintiffs in error; WM. W. VAN WAGENEN, for defendants in error. It was a suit brought by Funck and others against Merian & Benard, in the Superior Court of New York, to recover the freight and primage on two bills of lading. The plaintiffs were master and owners of the vessel, and the defendants were the consignees of the goods. The voyage was from Havre-de-Grace, in France, to New York. The first bill was Nov. 4th, 1839, for 9 packages of willow baskets. The second, March 19, 1840, for ten packages of willow baskets. It was admitted on the trial, that the whole 19 bales were, at different dates, received from the ship into the public store, on a general order to discharge the ship, and were delivered therefrom to a firm in New York—Mainon & Bonnay. The bills of lading consigned the goods to the defendants *or their order*; and after part of the goods were received into the public store, the defendants endorsed over the bills of lading as follows: "Deliver the within to Messrs. Mainon & Bonnay." At the request of the defendants, the plaintiffs made out their bills for freight against Mainon & Bonnay, who, as appeared from the testimony, were the owners of the goods, and frequently promised the plaintiffs payment, until their failure.

It was insisted by the plaintiffs that the goods were delivered into public store on general order to discharge the ship; such order was compulsory upon the plaintiffs, and delivery under it to the government, after the bill of freight had been rendered, and without notice that defendants were not responsible for the freight, was a *delivery to defendants*, especially, as the bills were not endorsed over until a part of the goods had been for some time in the public store. That the defendants could not be discharged from their liability unless by an express contract entered into.

It appeared that the Superior Court took this view of the case for the purposes of this trial, although they held that the law of the case would be reserved for ulterior consideration; and, under the charge of the court, the jury found a verdict for the plaintiffs for the whole amount.

The Supreme Court reversed the judgment of the Superior Court, and held, that it was well settled, that when goods by the terms of the bill of lading were to be delivered to the *consignee or to his order*, on payment of freight; the party *receiving*, whether consignee, assignee or endorsee, to whom the bill of lading had been endorsed by the consignor, made himself responsible for the payment of the freight. The law in such a case implied a promise on his part to pay. (Reported, 4 Denio, 110.)

## NEW YORK SUPERIOR COURT.

In the matter of the application of HENRY D. SMETHURST, for his discharge on a writ of Habeas Corpus.

*A judge*, under § 302 of the code, has power to punish as for a contempt, all disobedience of orders made by him in "proceedings supplementary to the execution." An attachment issued by him for such contempt may, therefore, properly be made returnable before him, *at his office*.

Although the code gives the power of punishing disobedience of his orders to the judge, reference must be had to the Revised Statutes as to the mode in which that power is to be exercised. (2 R. S. 535.)

Under this statute a judge, upon due proof, may, in his discretion, issue *an attachment* in the first instance against the party accused, to appear and answer, or he may grant *an order to show cause*. In either case, copies of the affidavit upon which the application is founded, should be served with the attachment or order. It is not necessary that the party accused should first have an opportunity of being heard upon an order to show cause before an attachment can issue. The attachment is not issued, in such instances, for the purposes of punishment, after a final adjudication. It is only a mode of bringing the party before the court.

*It seems*, that in the first district, the ordinary practice is, to give *notice of motion* for an attachment, or obtain an order to show cause.

Whether the affidavits upon which an attachment is issued are sufficient to warrant its issuing, is a matter that cannot be reviewed on *habeas corpus*.

*In chambers, before MASON, Justice.*—This was a *habeas corpus*, granted to inquire into the cause of the imprisonment of the petitioner, Henry D. Smethurst.

A judgment had been recovered against the prisoner in the Supreme Court in favor of one David Osterhout, and upon proof of an execution on such judgment having been returned unsatisfied, the usual order was made by Mr. Justice HARRIS, requiring him to appear before a referee and make discovery on oath concerning his property. He appeared in pursuance of the order with his counsel, and after the examination had been continued some time, a motion was made by his counsel for an adjournment until the next day, which was denied by the referee, and the counsel thereupon took his hat and left the room. The prisoner then peremptorily refused to answer any further questions in consequence of the absence of his counsel, and shortly after he also left the room. Upon proof by affidavit of these facts, the judge issued an attachment, directed to the sheriff of this city and county, by which he was commanded to attach the defendant so as to have him before the judge, *at his office* in the city of Albany, on a day therein named, there to answer, as well touching the contempt which was alleged he had

committed, as also such other matters as should then be laid to his charge, &c. A copy of the affidavits on which the attachment was granted, was served on the prisoner simultaneously with the attachment.

He then sued out this *habeas corpus*, and notice having been given to the plaintiff in the suit, the case came on, to be heard on the sheriff's return.

The prisoner, in reply to the return, alleged that the attachment was illegal and void;

1. Because it was granted *ex parte*, without the service of any previous notice or order requiring him to show cause why the process should not be issued.

2. Because the affidavits on which the same was granted, did not show sufficient cause for issuing the same; and

3. Because it was void on its face.

N. B. BLUNT, *for the prisoner.*

Mr. HADLEY, *for the plaintiff in the suit.*

MASON, Justice.—The last objection I shall consider first. Is the attachment void on its face? The counsel for the prisoner earnestly insisted that it was so, because it was made returnable before Justice HARRIS, *at his office*, whereas it should have been before the court at a special term; and he referred to the sections of the Revised Statutes on the subject of contempts (2 R. S. 534, &c.) which provides in all cases for the party being brought before the *court*, and not before a judge. The answer to this objection is very simple and decisive. The 302d section of the code in express terms confers on the *judge* power to punish as for a contempt, all disobedience of orders made by him in these proceedings, supplementary to the execution. The Revised Statutes gave this power of punishing for contempt only to Courts of Record; and attachments were then necessarily returnable before the court. A judge now, under the code, having this power conferred upon him in this special case, he cannot exercise the power unless the person is brought before him. The court, as such, cannot punish, because no contempt is shown to its authority; and no power is given to it to punish for contempt of the orders of the judge. If the party cannot, therefore, be brought before the judge on the attachment, he cannot be punished at all, and this section of the statute is a dead letter. This objection, therefore, must be overruled.

It was also insisted that the attachment was illegally issued, because no order to show cause was previously served on the defendant.

It was properly urged by the counsel for the defendant, and assented to

by the opposing counsel, that although the code gives the power of punishing disobedience of his orders to the judge, we must refer to the Revised Statutes as to the mode in which that power is to be exercised.

The objection of the learned counsel was founded on the third section of the act in relation to proceedings as for contempts to enforce civil remedies (2 R. S. 535,) which provides that where the misconduct mentioned in the first section is not committed in the presence of the court, the court shall be satisfied by due proof by affidavit of the facts charged, and shall cause a copy of such affidavits to be served on the party accused a reasonable time, to enable him to make his defence, except in cases of disobedience to any rule requiring the payment of money, or of disobedience to any subpoena. The fourth section authorizes a precept of commitment in case of disobedience of an order requiring the payment of a sum of money; and the fifth section provides that in all other cases "the court shall *either* grant an order on the accused person to show cause, at some reasonable time, to be therein specified, why he should not be punished for the alleged misconduct, or shall issue an attachment to arrest such party and to bring him before the court to answer for such misconduct.

It was insisted that according to the plain meaning of the third section, an attachment cannot issue until the party complained of has been afforded an opportunity of being heard in his defence; and that the proper and ordinary mode of doing this is by an order to show cause. This would be the case if an attachment was the punishment of the offence, and was founded upon a final adjudication of the matter by the court. But it is not pretended that this is the case; all that the learned counsel insisted on in his argument was that an attachment is a *preliminary adjudication* that the party had been guilty of a contempt. It would be more correct to say that, like an order to show cause, it is evidence that in the opinion of the court the party applying for it has made out a *prima facie* case, rendering it proper that the party accused should be called on for his defence, or in the language of the fifth section, to answer for such misconduct. It is only a mode of bringing him before the court. The evident meaning of the third and fifth sections taken together, it appears to me, is this: a party shall not be punished for any misconduct not committed in the presence of the court, except in the cases specially mentioned, unless the same shall be proved by affidavit to the satisfaction of the court, and unless after having been served with the affidavits containing such proof the accused party shall have been heard in his defence; and he is to be called upon to make his defence either by an order to show cause



why he should not be punished for his alleged misconduct, or by an attachment arresting him and bringing him before the court to answer for such misconduct. In both cases the affidavits must be served on him. When an order to show cause why he should not be punished for his misconduct is granted, he answers by counter affidavits. If an attachment be granted, he answers to interrogatories propounded to him. The third section declares the manner in which the complainant is to prove his charge, and the general principle that the accused is not to be condemned unheard. The fifth section provides two modes in which he may be called upon to defend himself. If the first mode is adopted, and no sufficient cause is shown, he may then be punished without any further proceedings, and this perhaps would be the most appropriate mode in some of the instances of misconduct specified in the first section, as in the case of a juror charged with improperly conversing with parties to a suit to be tried at the court for which he is summoned. If the latter method by attachment is pursued, unless the contempt is admitted, the party is punished only in case he shall be found guilty after his answers to the interrogatories shall have been taken, and such other proofs contradictory and in confirmation thereof shall have been received.

I am of opinion, therefore, from the best examination I have been able to give to the subject, that the course pursued in this case of issuing the attachment in the first instance, and serving with it the affidavits on which it was granted was warranted by the provisions of the statute. It is also in accordance with the view taken by the Supreme Court in *The People v. Nevins*, (1 Hill, 168,) and by the chancellor in the *Albany City Bank v. Schermerhorn*, (9 Paige, 372.) In this last case, however, an order to show cause why an attachment should not issue, had been previously served, and the question now before me was not raised. It is, I apprehend, the ordinary course in this district, to give notice of motion for an attachment, or obtain an order to show cause, and it is, as a general rule, the most advisable course. Cases may, however arise, in which it may be important for the rights of the party, prejudiced by the alleged contempt, that the defendant be brought into court on attachment in the first instance, and for that reason, doubtless, the statute has bestowed power to do so on the court or the judge, as I have endeavored to show. It is a matter resting in his discretion, with the exercise of which I have no right to interfere.

The third and last objection taken, viz. : that the affidavits on which the attachment, was issued were not sufficient to warrant its being given, is one of which I cannot take notice on this application. Judge Harris

had jurisdiction both of the subject-matter in controversy and of the person of the defendant. If he erred, it was an error of judgment as to the sufficiency of the evidence, to be corrected on motion to himself or by appeal; the attachment was in the usual form; was issued in a case allowed by law, and was authorized by the provisions of the law; so that it does not fall within the cases specified in the forty-first section, (2 R. S. p. 568,) in which prisoners in custody, by virtue of civil process, may be discharged. If upon the return to a writ of *habeas corpus*, the officer issuing it, can sit in judgment upon the correctness of the legal conclusions of a judge or court, in the lawful discharge of his or their duty, any inferior officer may annul or reverse the judgment and proceedings of the highest court, when they in the least affect the liberty of the citizen, (*The People v. Nevins*, 1 Hill, 159.) It is not for such purposes that the right of *habeas corpus* is secured, and the provisions of the act sufficiently guard against such a construction being put upon it.

Upon the whole I see no ground on which I can interfere in this case on behalf of the prisoner, and he must be remanded.

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## SUPREME COURT.

### HIRAM SLOCUM VS. MYRON WHEELER.

A defendant cannot both demur to, and answer at the same time, a single cause of action alleged in the complaint.

(The case of *Falconer v. Meyer*, 2 Code Rep. 49, commented upon and explained.)

*Rensselaer Special Term, June, 1850.*—This was a motion to strike out the demurrer, or the answer to the complaint in this action, or to compel the defendant to elect by which of said pleadings he would abide. The complaint contains but a single cause of action. It alleges that a partnership had existed between the plaintiff and one Nott, of the one part, and the defendant of the other, in the purchase and sale of cattle, and that, in closing the business, there was a loss of \$1005.43; for one half of which, by the terms of the partnership, the defendant was liable to the plaintiff, he being also the assignee of the interest of Nott. The defendant both demurred and answered. The pleading commences, by setting forth several distinct grounds of objection to the complaint, concluding such objections as follows: "for which cause the defendant de-

murs to the said complaint. It then proceeds to answer the complaint, by a denial of some of its allegations, and a statement of some new matter, by way of defence.

A. B. OLIN, *for plaintiff*.

G. STOW, *for defendant*.

HARRIS, Justice.—The single question presented by this motion is, whether a defendant may, at the same time, both demur to, and answer the same cause of action alleged in the complaint. The 143d section of the code declares, that the only pleading on the part of the defendant is, a demurrer *or* an answer; not a demurrer and an answer, but, in the alternative a demurrer *or* an answer. This was also the provision in the 121st section of the code of 1848. The plaintiff was allowed to unite in his complaint several causes of action, and yet no provision had been made authorizing a demurrer to *a part* of the complaint. It was accordingly decided, and very correctly, that, though a complaint contain two or more causes of action, there could not be a demurrer to one, and an answer to another, (*Manchester v. Storrs*, 3 Howard, 410.)

To remedy this defect, it was further declared, in the 145th section of the code of 1849, that the demurrer might be taken "to the whole complaint, or to any of the alleged causes of action stated therein." It was also further provided, in the 151st section, that when a defendant should demur to one cause of action stated in a complaint, he might answer *the residue*. Here, it is quite evident, that the framers of the code did not suppose, that a party could, at the same time, demur to, and answer the same pleading. And lest this rule might be carried so far as to preclude a defendant, after he had demurred to one cause of action, badly stated, from putting in a defence to another well stated, the latter section was adopted.

But it is supposed that the defendant's practice is sustained by the 150th section of the code, which provides that "the defendant may set forth by answer, as many defences as he shall have." I do not, however, understand that provision as authorizing both a demurrer and an answer to the same cause of action. It is to be borne in mind, that the section in question, is found in that chapter of the code which treats of *answers*, as distinguished from *demurrers*. The language of the section is satisfied by limiting it to the subject to which the chapter relates. Its import would then be, that the defendant may, by his answer, tender as many issues of fact, as he has grounds of defence. A defendant can only avail himself of a ground of demurrer, by answer, when the objection does not appear on the face of the complaint, (Code, § 14.)

The defendant's counsel has referred to a decision of the Superior Court of New York, as sustaining his practice, (*The People ex rel. Falconer v. Meyer*, 2 Code Rep. 49; *Gilbert v. Davis*, ib. 50.) I should have great hesitation in differing from the deliberate judgment of that learned court. It was chiefly on this account, that I retained this case for further examination. The reporter's note of the case in the Superior Court does, indeed, state that "a defendant may both demur and answer to the same cause of action. The case itself is very imperfectly reported, but enough appears to show that it was correctly decided, without involving the question under consideration. The action was upon a recognizance. The defendant, after denying some of the facts alleged, and stating new matter by way of defence, reserved to himself the right to object that the complaint did not state facts sufficient to constitute a cause of action, and also, that the court had not jurisdiction of the subject. The defendant also reserved to himself the right to object that no breach of the recognizance was alleged in the complaint, and that it did not state how, in what manner, or to what extent, damages had been sustained by any such breach. This was but another mode of stating the first ground of objection, that the complaint did not state facts sufficient to constitute a cause of action. There was, in fact, no demurrer, or apparent intention to demur. The defendant sought to do for himself, what the Legislature had already done better for him, by the 148th section of the code, which allows the objection to the jurisdiction of the court, and to the sufficiency of the facts stated to constitute a cause of action to be taken upon the trial, though they may not have been taken before. It was an idle, but very harmless thing, and the court very properly refused to strike out that part of the answer.

The decision of Chief Justice Marshall, (2 Brock. 15,) referred to upon the argument of the motion before the Superior Court, can have no bearing upon the construction of the provisions of the code already noticed. The question there arose under a statute of Virginia, which declares that "the plaintiff in replevin, and the defendant in all other actions, may plead as many several matters, *whether of law, or fact*, as he shall think necessary for his defence." (1 Rev. Code Virg. 500, § 88.) There all distinction between a demurrer, and a plea, or answer, is obviously abolished; all matters of defence, of law, as well as of fact, are to be set up by plea.

I need not refer to the inconvenience which would be the necessary result of the adoption of this mode of pleading to the different modes of trial, and the different forms of judgment, upon issues of law, and issues

of fact. Suppose this pleading to stand, and the defendant prevails upon his demurrer, what will become of the issue of fact? Suppose the plaintiff prevails upon the demurrer, what kind of judgment shall he have? Many like difficulties will readily occur, all which are obviated by requiring the defendant to elect, at the outset, in respect to each cause of action, whether he will tender to his adversary an issue of law or of fact. I have no doubt that this is the true meaning of the code. I shall therefore direct that the demurrer be stricken out, unless within twenty days after service of a copy of the rule, the defendant elect to retain the demurrer. In that case the answer is to be stricken out. The plaintiff is entitled to the costs of the motion. If the defendant does not elect to retain his demurrer, the plaintiff must have twenty days after the time for such election expires, to reply to the answer.

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#### SUPREME COURT.

##### WILLIAM P. VAN RENSSELAER VS. JAMES COTTRELL.

Assessors have jurisdiction and may legally assess "*all lands under water*," reserved to the owner in leases, (Van Rensselaer's Manor,) situated within their respective towns. If the owner is a non-resident of the town, and the lands under water are *occupied* by others, (using the water,) the assessment may legally be made against the owner, or it may be made against the occupants. There is no statute designating the manner in which lands, owned by a *non-resident* of the town or ward, and *occupied* by others, shall be assessed.

*Argued Albany General Term, September, 1849, and decided May General Term, 1850.—Before Justices PARKER, WATSON, HARRIS and WRIGHT.* This was an action of trespass, for taking and selling the plaintiff's horse. The defendant was collector of the town of Sandlake, in the county of Rensselaer, and justified the taking under a collector's warrant, issued in December, 1845. The trial was had before Mr. Justice Watson, at the Rensselaer circuit in November, 1847. It appeared from the assessment roll annexed to the warrant, and which was produced upon the trial, that the plaintiff had been assessed for various tracts and parcels of land in the town of Sandlake, and among others about 40 parcels of land *covered with water*. The first of these parcels is described as follows: land under water extending from the line of Brunswick in Sandlake to the Poestenkill school lot, eight acres, valued at \$16. The second parcel is described as follows: land under water, occupied by

Coonrod C. Cooper, and used as a grist and saw mill privilege, two acres, valued at \$400. These two instances will serve as examples of all the rest. They were all described in one or the other of these forms. The plaintiff paid to the collector all the taxes assessed upon his lands except those under water. Before the seizure, he informed the defendant that he did not consider himself bound to pay these taxes, and should contest their validity. The warrant is in the usual form, and commands the defendant to collect, from the persons named in the assessment roll annexed thereto, the several sums mentioned in the last column, &c. The plaintiff resided in Greenbush.

The judge charged the jury that the warrant attached to the assessment roll was regular and legal on its face, and that being so, it was a perfect protection to the defendant, who was acting under it, when he took the plaintiff's property, and that he was not bound to look beyond it; that the warrant and assessment roll were not necessarily connected; that, as to the defendant, the warrant and roll were to be considered and treated as distinct instruments, having no dependence upon each other, farther than to ascertain the amount of the tax and the names of the persons assessed; that the warrant, if valid, controlled and protected him even if the roll was irregular, or the assessment erroneously made. The counsel for the plaintiff excepted to the charge and instruction of the judge, and requested him to charge the jury that the assessments were illegal and void; that the warrant and assessment roll were necessarily connected, and that not only the warrant but the assessment against the plaintiff must be legal and valid on their face to protect him. The judge refused so to charge, and the counsel for the plaintiff excepted. The jury rendered a verdict for the defendant. A motion is made for a new trial upon a bill of exceptions.

D. BUEL, Jr. *for plaintiff.*

D. L. SEYMOUR, *for defendant.*

By the Court, HARRIS, Justice.—I think the only facts necessary to the jurisdiction of the assessors are, in reference to real estate, that it be situated in the town or ward, and in reference to personal property, that the owner be an inhabitant of the town or ward. If the assessors should assume to assess lands lying in another town or ward, or to assess an inhabitant of another town for personal property, though it might be situated in their town, the act of the assessors would unquestionably be void for want of jurisdiction. In this case, the lands assessed were situated within the town of Sandlake. The assessors, there-

fore, had jurisdiction of the subject-matter. In making the assessment, they performed a judicial act, in a matter within the limit of their authority. However much they may have erred in the performance of their duty, yet having jurisdiction of the subject-matter, their error may be corrected in the court of review, but cannot render their proceedings void. (*Bloom v. Burdick*, 1 Hill, 130; *Weaver v. Devendorf*, 3 Denio, 117; *Van Rensselaer v. Witbeck*, (decided at the present term;); *Van Rensselaer v. Hand*, MS. (meaning 'manuscript') opinion of Mr. Justice Wright, decided May term, 1849.) When the assessment roll is delivered to the supervisors, though uncorrected errors may appear upon its face, they are not authorized on that account to reject or disregard it, but it is the duty of the supervisors, notwithstanding such errors, to proceed to annex the tax list and issue their warrant for its collection. It is equally the duty of the collector to execute the warrant. Both will be protected in the discharge of this duty.

In the grants of land in the manor of Rensselaerwyck, among other reservations, the original proprietor, as is well known, reserved to himself "*all lands under water*." These lands the assessors have, in the case before us, sought to subject to taxation. Whether they acted judiciously in doing so, is not a question involved in this decision. It is enough to justify the defendant, if we find that they did not transcend their jurisdiction.

The principal ground upon which the validity of the assessment is in this instance sought to be impeached is, that it appears upon the face of the assessment itself, that some of the lands assessed were in fact occupied by other persons. I am inclined to think that this objection is not well taken in point of fact. The assessments are of "*lands under water*." In a majority of instances, the location of such land is merely given, but in other instances it is described as land under water, *occupied* by some other person, whose name is given, for a saw mill or grist mill, or some other kind of machinery. I think it quite obvious that it was the intention of the assessors to distinguish between the land under water and the water itself, and when they speak of land under water *occupied* or *used* (as it is sometimes expressed in the assessment roll,) as a mill privilege, it is merely intended to refer to the occupation or use of *the water*, as a mode of describing the land. It is to be kept in mind that the propriety of assessing a mill to its occupant and the land flowed by the dam of the mill to another person, as its owner, is not in question. The sole inquiry is, whether the assessors exceeded their jurisdiction.

But let it be assumed that the fair import of the terms used in the as-

assessment is, that the thing assessed, the land under water, was occupied by the person named. In what respect, even then, have the assessors failed to comply with the requisitions of the statute? The *first* section of the act (1 R. S. 389,) declares that the owner of lands when he occupies them himself, or in case they are wholly unoccupied, shall be assessed for them, if he resides in the same town or ward. The *second* section provides for a case where the owner resides in the same town or ward in which the lands are situated, but the lands are occupied by another person. In that case, the assessors are not bound to ascertain who is the real owner. If they know who is the owner he may be assessed for the lands; or they may assess the occupant as the owner. The *third* section declares that *unoccupied lands*, not owned by a person residing in the ward or town where the same are situated, shall be assessed in the manner subsequently provided in the same act. These subsequent provisions contain minute directions for assessing such unoccupied lands. They are found in the 12th and 13th sections of the act. The 4th subdivision of the 13th section directs the assessors in case a part of the tract of land, which is to be assessed by them under the provisions of that section, shall be settled and occupied by a resident of the town or ward, to except such part from the assessment of the whole tract, and assess it as *other occupied lands are assessed*. In all these provisions it will be perceived no directions are given as to the manner of assessing occupied lands which are owned by persons who are not residents of the town or ward where they are situated, such lands are clearly liable to taxation, (1 R. S. 387 § 1,) and as the Legislature have omitted to prescribe the manner in which the assessment of such lands shall be made, I can see nothing irregular or improper in the mode of assessment adopted in this case. The assessors having no statutory guide, have seen fit to specify both the owner and the occupant. Either, I think, would have been a sufficient compliance with the law. They might have regarded the occupant as owner, and assessed the lands as owned by a resident of the town; or they might, without noticing the occupant, have assessed them as lands of a non-resident owner. That they have specified who are the occupants, as well as the name of the owner, certainly cannot vitiate the assessment. By the 5th section of the title relating to the collection of taxes (1 R. S. 398,) it is provided that if any person shall neglect or refuse to pay any tax which shall be assessed in any ward or town *upon any estate of such person*, situated out of the ward or town in which he shall reside, and within the county, the collector may levy and collect such tax of the goods and chattels of the person assessed in any ward or town, within the county in which he shall reside. Here, then

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we have the express authority of the collector. A tax had been assessed, and, as we have seen, regularly assessed upon the lands of the plaintiff, situated in Sandlake. The plaintiff was a resident of Greenbush, another town within the county. The plaintiff had neglected or refused to pay the tax. These facts were sufficient to justify the collector in levying and collecting the tax of the plaintiff's goods and chattels.

The only objection taken to the form of the assessment is that, in some instances, the lands are not sufficiently described. Whether they are or not, I am unable to say; but if it were conceded that the description of some of the lands was imperfect, it is a matter with which the plaintiff has nothing to do. The only object of a minute description of the lands is to secure the collection of the tax by recourse to the land in case it should not otherwise be collected. If this should fail through defectiveness of the description, it might enure to the advantage of the owner, but could not work his injury.

The judge at the circuit held that the warrant alone was a sufficient protection to the defendant. In this I think he was right; but concede that he was wrong in holding that the warrant and assessment roll were to be considered as distinct instruments, having no dependence on each other further than to ascertain the amount of the tax and the names of the persons assessed. This would not entitle the plaintiff to a new trial. There was no question of fact to be decided. The charge, taking it most unfavorably to the plaintiff, amounted to nothing more than directing a verdict for the defendant, and to this he was entitled. The assessment roll, as well as the warrant, were legal. Whether, therefore, they are to be considered, as together constituting the process, under which the defendant acted, or whether the warrant alone constituted such process, is wholly immaterial. In either case the process was valid, and the defence was sustained.

The motion for a new trial must, therefore, be denied.

## SUPREME COURT.

## WILLIAM P. VAN RENSSELAER vs. ABRAM WHITBECK and NICHOLAS SHARP.

In an action of trespass against a tax collector and supervisor for taking property of plaintiff, by the collector, to satisfy the amount of tax directed to be collected; and verdict for defendants. It was insisted by the plaintiff on motion for a new trial, that the assessment roll was illegal and void, and therefore the warrant conferred no authority on the collector. 1st. Because the plaintiff was a non-resident of the town, which was well known to the assessors. 2. Because the assessment of the plaintiff's land in the assessment roll was designated in a separate list, between the resident and non-resident lists, and was not sufficiently described, and therefore not in conformity to the statute in relation to assessment of non-resident lands. 3d. Because the assessors disregarded the affidavit (see the copy in the case) made by plaintiff for the purpose of reducing the assessment of his ground rents; and 4th. Because the certificate of the assessors, attached to the assessment roll, was not, either in form or substance, such a certificate as the statute required. (See copy in the case.)

*Held*, that the essential thing to be done by assessors is to determine who are to be taxed and what property is taxable. This is a matter within their jurisdiction. In making the determination they act judicially, and though they may proceed irregularly, yet, having jurisdiction of the subject matter, their unreversed decisions cannot be questioned collaterally. (See 6 Hill, 646.)

Also *held*, that the power of review of assessment rolls, vested in boards of supervisors, is limited. They can only change and equalize the valuation, and make any alteration in the description of the lands of non-residents; any other errors of the assessors they cannot notice.

As to the particular objections of plaintiff, *held*, 1st, that the entire want of a *certificate*, much less the omission of the assessors to adopt the form prescribed in the statute could not invalidate a tax charged by the board of supervisors upon the persons and property specified in the assessment roll, if the assessment roll itself were in all respects conformable to law. It was but the evidence of what the assessors had done.

2d. The plaintiff's lands were *designated* in the assessment roll, "in a part thereof separate from the other assessments," and this was all the statute required in that respect, and the *description* therein given was sufficient for a non-resident. But, *conclusively*, a failure to comply with either of these directions of the statute, would be but an irregularity in a mere matter of form, in no way affecting the rights of anybody, and therefore would not vitiate the assessment. (See 21 Pick 64; 1 Hill, 130.)

3d. That the plaintiff by his *affidavit* to reduce the amount of the tax (provided it was clear that in the assessment of ground rents, it applied as in other cases of personal property, under the statute,) had not brought himself in any respect within the requirements of the statute. It was not entirely clear what it was intended the affidavit should express. The assessors were clearly right in disregarding it. *Motion for new trial denied.*

*Argued Albany General Term September 1849, and decided Albany May General Term, 1850.—Before Justices PARKER, HARRIS, WATSON and WRIGHT.* This was an action of trespass for taking and disposing

of personal property. It was tried at the Rensselaer circuit, February, 1849, before Mr. Justice HARRIS. It appeared upon the trial that the defendant, Sharp, was collector of the town of Greenbush, and had taken the property in question to satisfy a tax against the plaintiff. The defendant Witbeck, was supervisor of the same town, and, as such supervisor, had signed the collector's warrant. The defendants, to justify the taking, gave in evidence the assessment roll of the town of Greenbush, for the year 1847, and the warrant, issued by the board of supervisors of the county, to the collector of Greenbush, for the collection of taxes mentioned in the roll. To the warrant was annexed a copy of the assessment roll. By the terms of the warrant the collector was required to collect "from the several persons named in the assessment roll, annexed thereto, the several sums mentioned in the last column in each page thereof, opposite their respective names." The assessment roll contains first, the names of the taxable inhabitants residing in the town, arranged in alphabetical order, giving in columns opposite such persons' names the quantity and value of their real estate, the total amount of their real and personal estate, and the amount of tax assessed. In another part of the roll is inserted the assessment of the lands of non-residents, stating their names in alphabetical order, and giving in columns opposite each person's name, the quantity and value of his real estate, the total amount of his real estate, and the amount of tax assessed. Between these two classes of assessments are those against the plaintiff. They are as follows:

|                                                                       |                |          |
|-----------------------------------------------------------------------|----------------|----------|
| Van Rensselaer, W. P., or occupant of Mansion House, 608 acres, value |                |          |
|                                                                       | \$17,000, tax, | \$73.10  |
| Farm, McAuley, occupant, 208 acres, value                             | 4,000, "       | 17.20    |
| House and office,                                                     | 2,000, "       | 8.60     |
| Storehouse,                                                           | 150, "         | 66       |
| House and lot, Dearstyne, occupant,                                   | 150, "         | 66       |
| Dock,                                                                 | 500, "         | 2.15     |
|                                                                       | <hr/>          | <hr/>    |
|                                                                       | \$23,800,      | \$102.37 |

Amount of rents reserved in leases chargeable upon lands within the town of Greenbush, assessed according to an act passed May 13, 1846:

|                                       |              |        |
|---------------------------------------|--------------|--------|
| Van Rensselaer, W. P., bushels wheat, | 1928,10 lbs. | 20,657 |
| Services and wood,                    | 149,50       | 2,136  |
| Fowls,                                | 33,60        | 480    |
| Cash,                                 | 217,50       | 2,300  |
|                                       |              | <hr/>  |
|                                       |              | 25,571 |

Opposite which is carried out the tax assessed, amounting to \$109.96.

Annexed to the assessment roll is a certificate signed by the assessors, as follows :

" We do severally certify that we have set down in the foregoing assessment roll, all the real estate situated in the town of Greenbush, according to our best information, and that we have estimated the value of the said real estate at the sums which a majority of the assessors have decided *to be proper*, and that the assessment roll contains a true statement of the aggregate amount of the taxable personal estate of each and every person named in said roll, over and above the amount of debts due from such persons respectively, and excluding such stock as is otherwise taxable, *according to the usual way of assessing*. Greenbush, August 30th, 1847.

MARTIN DE FREEST,  
BENJAMIN G. DENNISON,  
GEORGE C. BARRINGER,  
*Assessors."*

The plaintiff proved that in the fall of 1846, he removed from Greenbush, where he had previously resided, to the city of New York, and had not since been a resident of Greenbush ; that in August, 1847, his agent had appeared before the assessors, and stated to them in the presence and hearing of the defendant Witbeck, that the plaintiff was not a resident of Greenbush, and presented to the assessors an affidavit in the words following :

" Rensselaer county, ss. : William P. Van Rensselaer, of the city and county of New York, being duly sworn, says that the value of the annual rents, owned by him, liable to taxation, in the town of Greenbush in said county, by the act intituled " an act to equalize taxation," passed the 13th day of May, 1846, will not exceed the sum of eleven thousand two hundred and eighty-eight dollars, after there shall be deducted from the same the just and true proportion of all his just debts that will remain unpaid, after all the personal property owned by him, except that invested in the stock of incorporated companies, liable to taxation under the 12th chapter of the first part of the Revised Statutes, shall be applied to the payment of all his just debts ; said proportion so deducted, being the amount of said debts, which, if all his debts, except those to be paid, as before mentioned, by his personal property, were deducted from all his rents, would by such deductions be taken from the whole amount of his rents in said town.

WM. P. VAN RENSSELAER.

Sworn before me this 14th day of August, 1847.

MARTIN DE FREEST,  
JAN 1848.  
LIBRARY.

The counsel for the plaintiff insisted that the assessment roll was illegal and void, and, therefore, that the warrant conferred no authority on the collector to take the plaintiff's property.

The grounds upon which it was insisted that the assessment roll was illegal and void, were: 1st, because the plaintiff was a non-resident of the town, which fact was known to the assessors and the defendants; and 2d, that the assessment of the plaintiff's lands, in the manner specified in the assessment roll, was void as an assessment of lands of a non-resident, because it was not made in conformity to the provisions and directions of the statute, respecting the assessment of non-resident lands. 3d. That the assessment of the plaintiff for ground rents, chargeable on lands in Greenbush, was illegal and void, because the assessors disregarded the affidavit made by the plaintiff and presented to the assessors, and refused to reduce the amount, at which said ground rents were assessed by them, in conformity with the affidavit; and 4th, that the certificate of the assessors attached to the assessment roll was not either in form or substance, such a certificate as is required by the 26th section of title 2, chapter 13 of the first part of the Revised Statutes, and was illegal and void on its face, and the warrant was no justification to the defendants for want of such a certificate as is required by the statute.

The judge decided that the warrant and assessment roll, and assessors certificate, in connexion with the evidence, were sufficient to protect the defendant from liability to the plaintiff in this action, and that the plaintiff was not entitled to recover, and therefore, directed a non-suit to be entered. The plaintiff's counsel excepted to the decision and direction, and moved for a new trial upon a bill of exceptions.

D. BUEL, Jr., *for plaintiff.*

D. L. SEYMOUR, *for defendants.*

By the Court, HARRIS, Justice.—The first duty of assessors is, by diligent inquiry to ascertain who are the taxable inhabitants, and what is the taxable property, within their respective towns or wards. Having done this they are next to proceed to make, in a prescribed manner, an assessment roll. It is to contain four separate columns, in the *first* of which is to be inserted the names of all the taxable inhabitants; in the *second*, the *quantity* of land taxable to each inhabitant; in the *third*, the *full value* of such land, and in the *fourth* the full value of all the taxable personal property. In another part of the same assessment roll, separate from the other assessments, they are to designate, in a particular manner, the lands of non-residents. The first direction is, that the land to be as-

essed shall be designated by its name, if it be known by one. The rule of valuation is also prescribed. When the assessment-roll is completed, it is to be submitted to the examination of the inhabitants of the town or ward for twenty days, at the expiration of which time the assessors are required to meet to review the assessment upon the application of any person conceiving himself aggrieved. The assessors are then to sign the roll and attach thereto a certificate, the form of which is prescribed, and to deliver the roll, thus certified, to the supervisor. The essential thing to be done by the assessors is to determine who are to be taxed and what property is taxable. This is a matter within their jurisdiction. In making the determination they act judicially, and though they may proceed irregularly, yet, having jurisdiction of the subject-matter, their unreversed decisions cannot be questioned collaterally. If, for example, some other rule of valuation than that prescribed by the statute should be adopted, or if the assessors should refuse to value the estate of any person liable to taxation, at the sum specified in the affidavit of such person, it might, perhaps, furnish ground for reversing the proceedings, but it would not be ground for holding the assessment void upon a collateral question. (*Marchant v. Langworthy*, 6 Hill, 646.)

There are other provisions of the statute prescribing the duties of assessors which are obviously directory in their character. Of this description is the requirement in the 8th section that the assessors shall ascertain between the first days of May and July, who, and what property is taxable, and the 19th section requiring the assessors to complete their rolls on or before the first day of September; and the 27th section which requires the certified roll to be delivered to the supervisor of the town on or before the first day of October. These duties, though required, are not "of the essence of the thing to be done," and therefore are not essential to the validity of the assessment. So too, I think, the certificate required by the 26th section of the statute is to be regarded. If the assessors have performed their duty in making the assessment-roll, as they may be presumed to have done, the certificate amounts to nothing more than a solemn declaration on their part, that they have performed such duty. It forms no part of their adjudication, upon which the action of the board of supervisors is to be taken. It is but the evidence of what the assessors have done, and therefore it seems to me would not, even in a direct proceeding, bringing in question the validity of the assessment, be the subject of review. At any rate the entire want of such certificate, much less the omission of the assessors to adopt the form prescribed in the statute, could not invalidate a tax

charged by the board of supervisors upon the persons and property specified in the assessment roll if the assessment itself were in all respects conformable to law.

The board of supervisors are required to examine the assessment rolls returned to them, for the single purpose of ascertaining whether the valuations of real estate in one town or ward, bear a just relation to those in the other towns or wards in the county, and if they do not, the board is authorized to change such valuation so as to produce such relation. It is also authorized to make any alteration in the description of the lands of non-residents, necessary to make such descriptions conformable to law. To these objects, the power of review, vested in the board of supervisors, is limited; any other errors committed by the assessors in the discharge of their duty, it is not within the province of the board of supervisors to notice. The assessment-rolls being returned to them, containing the names of the persons to be taxed, and the taxable property, and the assessors' valuation of such property, it is the duty of the supervisors, after having examined and corrected the valuations and the descriptions of the lands of non-residents, to proceed to annex the tax list. No mere irregularity in the proceedings of the assessors would justify the supervisors in omitting the discharge of this duty. That the assessors in this case were guilty of a gross departure from a duty plainly defined by the statute, is obvious; and yet it is a matter within the knowledge of every one at all acquainted with the manner in which the duty of assessors is discharged, that the certificate which the assessors, in this instance, annexed to the assessment-roll, prepared by them, was the only certificate, which, as men of truth, they could subscribe. The law requires assessors to estimate all property, liable to taxation, at its full value, as they would appraise the same in the payment of a just debt due from a solvent debtor. With this requirement of the statute before them, and acting under the obligation of their official oath, it is the uniform practice of assessors to estimate all real estate at a valuation greatly below its real value. There probably is not to be found a single instance in the state in which assessors have estimated the value of real estate according to the standard prescribed by the statute. The whole assessed value of the real estate, liable to taxation throughout the state, is probably less than half its real value. The real difference between the certificate before us, and that usually annexed to assessment rolls, is, that in this case, the assessors have, in fact, stated the truth, while others, in following the form prescribed by the statute, have certified to what they must have known to be untrue.

It is also insisted that the assessment of the plaintiff's lands in Green-

bush was illegal and void, because they were assessed as the lands of a resident of the town, and not in conformity with the provisions of the statute relating to the assessment of the lands of non-residents. I am unable to perceive that this objection is founded in fact. It appears that the lands of the plaintiff are entered in the assessment-roll by themselves, upon a page standing between the assessment of the taxable inhabitants of the town, and the assessment of the lands of non-residents. The plaintiff's lands are designated in the assessment-roll, "in a part thereof separate from the other assessments," and this is all that the statute requires in this respect. I think, too, there is a substantial compliance with the statute in relation to description; as I understand the direction of the statute, it is enough, where the land of a non-resident is known by a name, to enter it in the assessment-roll by such name, and then to set down in two other columns the quantity and valuation of the land assessed. This was done in respect to each parcel of the plaintiff's land. But a conclusive answer to the objection is, that these directions are given with a view to the convenience of the officers engaged in the collection of taxes, and with reference to the probability that a sale of the lands may be necessary. To the owner it is a matter of indifference whether his lands are assessed as the lands of a resident or a non-resident, or whether they are described in the particular manner specified or not. His rights are not affected by the observance or the non-observance of these regulations of the statute. In either case, the amount of the tax with which he is chargeable is the same; a failure to comply with either of these directions of the statute would be but an irregularity in a mere matter of form, in no way affecting the rights of anybody, and therefore would not vitiate the assessment.

The distinction between such irregularities as affect the validity of an assessment and those which do not, is considered in the case of *Torrey v. Milbury*, (21 Pick. 64.) That was an action by a tax payer to recover back money paid upon a warrant of distress for a tax, upon the ground that the tax was illegally and irregularly assessed. The statute of Massachusetts requires the assessors, in making out their list, to set down in distinct columns "*the true value of real estate*," and "*the reduced value of real estate*." In the case before the court, the assessors had omitted to comply with the requirement, and had inserted in their list but one column, which was headed "value." The question was, whether this irregularity rendered the assessment void, so that each person taxed might take advantage of it and recover back the money he had paid. It was held that a compliance with the requirement of the statute in re-



spect to distinct columns for the true and reduced value of the lands assessed, was not a condition precedent to the validity of the tax, but was to be regarded as merely directory. SHAW, Ch. J. in delivering the opinion of the court, says, "in considering the various statutes regulating the assessment of taxes, and the measures preliminary thereto, it is not always easy to distinguish which are conditions precedent to the legality and validity of the tax, and which are directory merely, and do not constitute conditions. One rule is plain and very well settled, that all those measures, which are intended for the security of the citizen, for securing an equality of taxation, and to enable every one to know, with reasonable certainty, for what polls, and for what real and personal estate he is taxed, and for what all those who are liable with him are taxed, are conditions precedent, and if they are not observed he is not legally taxed, and he may resist it in any of the modes authorized by law for contesting the validity of the tax. But many regulations are made by statute, designed for the information of assessors and officers, and intended to promote method, system and uniformity in the modes of proceeding, the compliance or non-compliance with which does, in no respect, affect the rights of tax-paying citizens. These may be considered directory; officers may be liable to legal animadversion, perhaps to punishment, for not observing them. But yet their observance is not a condition precedent to the validity of the tax."

In *Bloom v. Burdick*, (1 Hill, 180,) the same distinction is well stated; a surrogate had granted administration upon an estate without taking a proper bond; the statute required that officer, upon granting administration, to take sufficient bonds, &c. and with *two or more* competent sureties; he had taken a bond with but one surety. BRONSON, J.: "the duty of the surrogate is plain; but the omission to take *two or more sureties* is not a matter which goes to the foundation of the proceeding so as to render the letters of administration void; only two things were essential to the jurisdiction of the surrogate in granting the administration, to-wit, the death of the intestate, and the fact that at or immediately previous to his death, he was an inhabitant of the same county with the surrogate. If those facts existed, the surrogate had authority to act, and the omission to take a proper bond was an error to be corrected on appeal, and not a defect of jurisdiction which would render the whole proceeding void. (See also *Weaver v. Devendorf*, 8 Denio, 117; *Williams v. Holden*, 4 Wend. 223; *Van Rensselaer v. Cottrell*, *ante*, page 376.)

The only other ground upon which it is contended that the assessment is illegal is, that the assessors disregarded the plaintiff's affidavit and

refused to reduce the amount at which his ground rents were assessed. By the 15th section of the statute relating to the assessment of taxes, it is provided that any person whose personal estate is liable to taxation, may make an affidavit that the value of his personal estate, after deducting his just debts, &c., does not exceed a certain sum, and in such case it is made the duty of the assessors to value such personal estate at the sum specified. Whether this provision can be made applicable to the assessment of rents, under the act of 1846, I do not propose now to consider. If it be assumed that it is thus applicable, the slightest reference to the plaintiff's affidavit will be sufficient to show that he has in no respect brought himself within that provision, so as to require the assessors to reduce the amount of his assessment. It is not entirely clear what it was intended the affidavit should express; but if I have been able to understand its import, it is, that after applying all the personal estate of the plaintiff, except his rents, to the payment of his debts, a large amount would remain unpaid; and if his rents in Greenbush should be charged with the same proportion of such unpaid balance of debts, as his rents in other towns, it would reduce the value of such rents to the amount specified in the affidavit. It cannot be necessary to do more than refer to the complicated terms of the affidavit to make it apparent that it is in no respect conformable to the provisions of the section of the statute under which it is sought to give it effect. The assessors were, therefore, clearly right in disregarding it.

Having come to the conclusion that none of the objections to the validity of the assessment roll are well founded, it becomes unnecessary to consider the other questions discussed upon the argument. The assessment being valid, the supervisors were bound to issue their warrant to the collector, and for what he has done, that warrant was a full justification. The nonsuit was therefore properly granted, and the motion for a new trial must be denied.

## SUPREME COURT.

WILLIAM P. VAN RENSSELAER VS. BENJAMIN G. DENNISON.

There are, among others, contained in the Van Rensselaer leases, (Van Rensselaer's Manor,) covenants as follows: (after covenanting to pay the rent, &c.,) "and will also well and truly discharge and pay all taxes, charges and assessments, ordinary and extraordinary, taxed, charged or assessed, and which may hereafter be taxed, charged or assessed to or upon the said hereby granted premises, or upon any part or parcel thereof, or upon the said Stephen Van Rensselaer, his heirs, executors, administrators or assigns, by any act of the Legislature or by county rates or otherwise howsoever, *for and in respect of the said premises*, or any part thereof, and indemnify the said Stephen Van Rensselaer, his heirs, executors, administrators and assigns, of, from and against, any damages, costs and charges which he or they or any of them may sustain or be put to, by reason of any neglect in the due and punctual discharge and payment of the said taxes, charges and assessments.

Under this covenant, it was claimed that the lessee (or his assigns) was liable over to pay the *tax on the rents* reserved in the lease, which the landlord, the legal representative of the lessor, had been compelled to pay under an act of the Legislature of this state, passed May 13th, 1846, entitled "an act to equalize taxation."

*Held*, 1st. That the tax paid by the landlord was on property, declared by the act of 1846 to be, for the purpose of taxation, *personal estate*. It was a tax on rents *issuing out of* the granted premises, but in no sense a tax *on* the "granted premises."

2. That it was not a tax "*for and in respect of the said premises*," because it was on rents that issued out of said premises. The landlord was not taxed for and in respect of said premises, but for and in respect of the rents reserved thereon. The tax was laid without reference the farm, and in no sense "in respect to the premises" or their value. It was the *income* of the person which was taxed, at a uniform value prescribed by the statute.

(*Lessee or his representatives, not liable to pay the tax.*)

*Albany General Term, Feb. 1850.—Before Justices PARKER, HARRIS and WRIGHT.* This was an action of covenant tried before Mr. Justice PARKER, at the Rensselaer circuit in April, 1848. The suit was brought to recover arrears of rent due on a perpetual lease executed on the 4th day of November, 1789, by Stephen Van Rensselaer, deceased, to Jacob Van Iveren and Gysbert Van Iveren. The defendant became the owner of the lease by assignment on 1st January, 1836, and the plaintiff succeeded to the interest of Stephen Van Rensselaer, by devise, on the 26th day of January, 1839. It was shown that the amount of rent and interest thereon, which had accrued in the lease since 1st January, 1840, was \$136.49. The plaintiff also claimed to recover (\$1.01) the amount of a tax on the rents reserved in said lease, which he had been compelled to pay under an act of the Legislature of this state, passed May 13, 1846, entitled "an act to equalize taxation." The farm was in the town of Greenbush in said

county of Rensselaer. The following, among other covenants, were contained in the lease: "And the said parties of the second part for themselves, their heirs, executors, administrators and assigns, do covenant, grant and agree, to and with the said Stephen Van Rensselaer, his heirs and assigns, that they, the said parties of the second part, their heirs, executors, administrators or assigns, will from time to time well and truly pay, or cause to be paid, unto the said Stephen Van Rensselaer, his heirs and assigns, the yearly rent above reserved, at the days and times and in the manner aforesaid; and will also well and truly discharge and pay all the taxes, charges and assessments, ordinary and extraordinary, taxed, charged or assessed, and which may hereafter be taxed, charged or assessed to or upon the said hereby granted premises, or upon any part or parcel thereof, or upon the said Stephen Van Rensselaer, his heirs, executors, administrators or assigns, by any act of the Legislature or by county rates or otherwise howsoever, for and in respect of the said premises or any part thereof, and indemnify the said Stephen Van Rensselaer, his heirs, executors, administrators and assigns, of, from and against any damages, costs and charges which he or they or any of them may sustain or be put to, by reason of any neglect in the due and punctual discharge and payment of the said taxes, charges and assessments."

The court directed a verdict for the plaintiff for the amount of rent and interest due in said lease, and for \$1.01, the amount claimed by the said plaintiff for the tax paid by him, said verdict to be taken subject to the opinion of the Supreme Court.

D. BUEL, Jr., *for plaintiff.*

D. L. SEYMOUR, *for defendant.*

By the Court, PARKER, Justice.—The lessees covenanted for themselves, their heirs, executors, administrators or assigns, to pay all taxes that might be thereafter taxed, charged or assessed, to or upon the said thereby *granted premises*, or upon the said lessor, his heirs, &c., by any act of the Legislature, &c., *for and in respect of* the said premises. Under this covenant the plaintiff claims the defendant is liable to pay the tax in question. Though the amount is small, the question is important, inasmuch as it may be raised on a great number of other leases, containing like covenants. It demands, therefore, a deliberate examination.

The sum paid by the plaintiff cannot be recovered from the defendant, unless it was paid for a tax charged or assessed upon the *premises granted* by said lease; or upon the plaintiff *for and in respect of* the said premises.

The tax in question was assessed upon the plaintiff, for his rents reserved in the above mentioned lease, under the act entitled "an act to equalize taxation," passed May 18, 1846. The first section of that act makes it the duty of the assessors of each town or ward, to ascertain the amount of rents reserved in any leases in fee, for one or more lives, or for a term of years exceeding twenty-one years, and chargeable upon lands within such town or ward, and premises as follows: "which rents shall be assessed to the person or persons entitled to receive the same, as personal estate, which is hereby declared to be, for the purpose of taxation, under this act, &c.

The tax then paid by the plaintiff, was upon the rents reserved in the lease. Were such rents any part of the "granted premises?" The plaintiff's counsel contends that they are; that the rents were granted to the lessor, as well as the lands to the lessee; and that both are included in the words "granted premises." But I cannot agree with him in such a construction. The rents were not granted to the lessor; they were reserved by the lessor when he granted the land to the lessees. The word "premises," is used here as in other instruments, to express briefly the property conveyed; and that it is so used here is evident, from an examination of its meaning wherever it occurs in other parts of the lease: as for example, the lessor reserves all creeks, streams and runs of water "in and upon the said premises," and the right of erecting mills upon any part of the said "hereby granted premises;" and the right "of way and passage to, from, in and out of the said hereby granted premises:" and, again, the lessee covenants that in case he shall be disposed to sell the said "hereby granted premises," he shall make an offer in writing to the lessor, &c., of said "premises." These are but a few of the many instances in which the word "premises," is used in the lease as meaning the farm conveyed by the lease. It seems to me plain, that it is not and could not well be used in any other sense in any part of the lease. Now the tax paid by the plaintiff, was on property declared by the act of 1846, to be, for the purpose of taxation, personal estate. It was a tax on rents issuing out of the granted premises, but in no sense, I think, a tax on the "granted premises."

It is very much like the case of *Robinson v. The County of Allegany*, (7 Barr, R. 161.) That was a lease in fee reserving rent, and the lessee covenanted forever thereafter to pay and discharge all public taxes, of whatever kind or denomination, that might be assessed upon the premises thereby demised, without any deduction for the yearly rent. A tax was assessed upon the ground rents reserved. The court held the landlord bound to pay the taxes, and that he had no remedy against the tenant.

But, it is claimed, that if this was not a tax upon the "granted premises," the claim of the plaintiff is sustainable under the next clause of the covenant, by which the defendant is bound to pay all taxes assessed upon the plaintiff, "for and in respect of said premises." Was this a tax "for said premises," and also "in respect of said premises?" It must be both to be within the covenant. I think it was neither. It was not a tax "for said premises;" that would mean the same as a tax "on said premises," and I do not see how it can properly be said to be a tax "in respect of" said premises, because it was on rents that issued out of said premises. The plaintiff was not taxed for and in respect of said premises, but for and in respect of the rents reserved thereon. The value of the premises had no influence in regulating the amount of the tax. The rent reserved might be a high one on a poor farm, or a low one on a valuable farm. The farm was never appraised, nor its value estimated. The tax was laid without reference to the farm, and in no sense, "in respect of the premises," or their value. It was the income of the person which was taxed, at a uniform value, prescribed by the statute.

Suppose a general income tax should be laid, and the plaintiff in this case should be assessed for his whole income; could he collect a part of the tax from the defendant under this covenant, because a portion of his income was rent of the defendant's farm? I think not, nor do I see how the cases would differ in principle. In both it would be a tax on the income alone.

It is said, it was evident the intention of the parties when the lease was executed, that the covenant should provide for a tax like that in question; and that unless it is applicable to it, the words used mean nothing. The intention of the parties can only be ascertained from the language they employed. We are not at liberty to alter one word or letter of the contract, because we suppose the parties may have meant something they have not said. Nor is the covenant destitute of meaning and value. The lessor has carefully provided against contingencies that may happen, in such language as to protect himself against loss. Suppose the tenant should leave the farm unoccupied and neglect to pay the taxes charged upon it, and the landlord should pay the tax to save the land from being sold for taxes; I suppose this would be a case within the first clause of the covenant where the tenant could be compelled to repay the tax to the landlord. Or suppose the Legislature, as they have a perfect right to do, provide that the annual tax on the farm may be assessed either upon the landlord or the tenant, and it be assessed to and collected from the landlord. This would clearly be a tax assessed upon him "for and in re-

spect of the premises," and within the same clause of the covenant under which he would be able to compel repayment. The covenant may therefore be valuable, but it does not reach the tax in question.

The object of the covenant is apparent. It was to protect the lessor against loss by reason of taxes on the farm. The first clause was to prevent incumbering the farm with taxes and thus lessening or defeating the landlord's security for his rents: the second was to protect the landlord against personal liability for the same taxes. And I think the meaning of the covenant is, that the tenant shall pay all taxes assessed on the farm, and if they are assessed against the landlord, and he pays them, he may recover them from the tenant.

I am satisfied this claim cannot be maintained; and as to the amount of the tax paid by the plaintiff there ought to be a judgment for the defendant.

Judgment for plaintiff for the rent and interest, \$136.49, and for the defendant to the residue.

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## SUPREME COURT.

JOHN V. L. OVERBAGH and others vs. JOHN M. PATRIE.

A sixth sale reservation, contained in a lease in fee, is void; otherwise, in a lease for years or for lives.

Where the payment of such sixth sale is made a condition subsequent, the condition is void and the estate stands divested of such condition.

(*This decision applies in principle to the quarter sales contained in the Van Rensselaer leases in fee, in the Manor of Rensselaerwyck.*)

*Albany General Term, February 1850.—Present, Justices WATSON, PARKER and WRIGHT.* This was an action of ejectment, tried before Mr. Justice WILLARD, at the Albany circuit, in October 1847. The suit was brought to recover a farm lying in Coeymans, in the county of Albany, which the plaintiffs claimed in fee. The defendant pleaded the general issue.

The plaintiffs showed a patent from Queen Anne to Andreas Coeymans and others, bearing date the sixth day of August, 1714, under which the premises in question became the property of Isaac D. Verplanck, who devised all his interest in the same to the plaintiffs on the 26th day of June, 1828. On the 6th day of June, 1815, an indenture was executed by which the farm in question was leased in fee by said Isaac D. Verplanck to Henry Arnold and James H. Arnold, their heirs and assigns

forever, in consideration of five shillings and the yearly rents, covenants and conditions therein contained. An annual rent of seventeen dollars was reserved, after which there was the following provision:

"And the said party of the first part doth hereby further save and reserve unto himself, his heirs and assigns, the one equal sixth part of all purchase or consideration moneys or other things in lieu thereof, arising or that may arise, by or from the selling, demising, assigning, or anyhow disposing of the said premises hereby granted, or any part thereof, by the said party of the second part, his heirs, executors, administrators and assigns; and when and as often as the same shall be sold, demised, assigned or otherwise disposed of; and the said party of the second part for himself, his heirs, executors, administrators or assigns, doth *covenant, grant and agree* to and with the said party of the first part, his heirs and assigns, that he and they will well and truly pay or deliver unto the said party of the first part, his heirs or assigns, the said *equal one-sixth part* of the said moneys or other things in lieu thereof, arising or which may arise by, from, or out of, every such sale, demise, assignment or other disposition aforesaid; and further, that prior to any such sale, demise, assignment or other disposition aforesaid, the said party of the second part, his heirs or assigns, shall and will make an offer in writing unto the said party of the first part, his heirs or assigns, of the same premises, or such part thereof, and for such estate therein as the said party of the second part, his heirs or assigns shall intend to dispose of, specifying the same, and the price, value or consideration which the said party of the second part, his heirs or assigns is or are willing to take for the same: and the said party of the first part, his heirs or assigns, on his or their part, shall, within twenty-one days, pay or deliver such price, value or consideration, after deducting the said equal sixth part thereof, and the arrears for rent, if any there be, unto the said party of the second part, his heirs or assigns, then and in such case the said party of the second part, his heirs or assigns, shall and will, forthwith after such payment or delivery made, well and sufficiently convey and assure unto the said party of the first part, his heirs or assigns, the said premises, or the part thereof so offered, and for such estate therein as shall have been in that behalf specified. Provided, always, that if the said party of the first part, his heirs or assigns shall not, within the said twenty-one days, for that purpose limited, agree to take and accept the said premises, or the part thereof so offered as aforesaid, at such price, value or consideration as aforesaid, and shall not, within the said twenty-one days, pay or deliver such price, value or consideration, after such deduction thereout as aforesaid, unto the said party of the second part, his heirs or assigns, then it



shall be lawful for the said party of the second part, his heirs or assigns, to sell, demise, assign or otherwise dispose of the said premises, or the part thereof so offered, unto any person or persons whomsoever. Provided, nevertheless, *and these presents are on this express condition*, that every sale, demise, assignment or other disposition of the said premises hereby granted, or any part thereof, by the said party of the said second part, his heirs or assigns, to any person or persons other than to the said party of the first part, his heirs or assigns, or other than by process or compulsion of law for the consideration of money or other things in lieu thereof, *shall be utterly void* and of no effect in law or equity, unless such offer thereof shall have been made and not accepted or complied with as aforesaid, and unless the said party of the second part, his heirs or assigns, or the person or persons to whom such sale, assignment or other disposition shall have been made, shall, within twenty-one days thereafter, well and truly pay or deliver unto the said party of the first part, his heirs or assigns, the said equal sixth part of the said price value or consideration for which the said premises, or any part thereof, as the case may be, shall have been offered to the said party of the first part, his heirs or assigns, together with all arrears of rent which may be their due.

"Provided further, and these presents are upon the further condition that every sale of said premises, or any part thereof, by process of law against the said party of the second part, his heirs, executors, administrators or assigns, shall also be void and of no effect, unless the purchaser or purchasers thereof shall, within twenty-one days after such sale, pay unto the said party of the first part, his heirs or assigns, a sum of money equal to one-sixth part of the sum for which the said premises, or the part thereof so sold, shall be struck off or sold by virtue of such process, to the purchaser or purchasers.

Then followed a condition against the erection of any mill, mill dam, or any other work or building whatsoever, upon any kill, creek, stream or run of water, and a prohibition of waste, also a provision against cutting and carrying off, for sale, any wood or timber.

There was the usual provision for re-entry in case any of the conditions should not be performed and fulfilled.

It was proved that James Arnold was formerly in possession of the land, and claimed to own it, under the said lease, together with James H. Arnold his son, and died in possession nineteen or twenty years before the trial. That one Bishop bought from the widow of Arnold and her heirs, and went into possession, and the defendant bought from Bishop and entered upon the farm. That the defendant claimed to hold it by "an everlasting lease."

The counsel for plaintiff did not claim a violation of any other condition of said lease, except these relating to the sale of said premises by the lessees, &c., the giving notice of intention to sell, &c., and reserving the one-sixth part of the purchase-money on such sale.

The defendant's counsel moved for a non-suit on the ground that the defendant had held adversely more than twenty-five years. The court overruled the motion, and defendant's counsel excepted.

The counsel for defendant then renewed his motion for a non-suit on the following grounds:

1. That there was no proof of any breach of condition.
2. That the condition in said lease, for the violation of which the plaintiff's claim to recover, manifestly contravenes public policy, and is injurious, beyond all doubt, to the interests of the state, and is therefore void.
3. That the said condition is repugnant to the grant of a lease held in fee, and is therefore void.
4. That the condition is in contravention of the terms, or at least of the spirit and intention of the statute concerning tenures. It is, in substance, a fine for alienation and void at common law and by statute.

But the justice overruled these objections and denied the motion, and directed the jury to find a verdict for the plaintiffs; to which several decisions the defendant's counsel excepted. The jury accordingly found a verdict for the plaintiffs, and the defendant moved for a new trial.

A. TABER, *for defendant.*

S. STEVENS, *for plaintiffs.*

By the Court, PARKER, Justice.—By the indenture in question, Isaac D. Verplanck reserved the right to receive, and the lessees promised to pay one-sixth part of the purchase money, whenever the premises should be sold by the lessees, their heirs or assigns. He also reserved a pre-emption right to the property, at a deduction of one-sixth of its price or value. The plaintiff claimed at the trial, to recover, on the ground that the property had been twice sold without paying over the "sixth sale" reserved; and that in both instances the sales had been made without having first offered to sell the farm to the lessor on the terms prescribed in the lease. If these were valid conditions, the forfeiture was incurred and the plaintiffs had a right to re-enter.

I think the only question here presented is, whether the sixth sale reservation was valid. The forfeiture of one-sixth of the purchase-money was to be incurred whether the sale was made to the lessor or to a third person. The lessees could not, therefore, comply with the conditions of

the lease by first offering to sell for a reasonable price to the lessor, they were required to go further, and to submit to a sale to him for five-sixths of the value. If, therefore, the reservation of the sixth sale was invalid, it follows that the right of pre-emption on such a condition, was also void.

The question is an important one. Reservations of this description, generally known as "quarter sales," "sixth sales," and "tenth sales," have been frequently made in perpetual leases in fee. The legal title to hundreds of farms now depends upon their validity; and though it may be true that forfeitures for a breach of such conditions have been rarely enforced, the question involved is none the less important in principle. It is perhaps because the claim to the quarter sale has been generally compromised for a small sum, much less than the cost of testing its validity, that this question has been so rarely, if ever, brought before the courts of this state for examination.

It is claimed, on the part of the plaintiffs, that this question has been decided in the late Supreme Court of this state. If so, we are bound by such authority, and shall not have occasion to discuss the principle. It is important, therefore, that we first ascertain whether it is an open question.

The case principally relied on by the plaintiffs, is *Jackson v. Schutz*, (18 John. R. 174.) That, like this, was an action of ejectment to recover possession for an alleged forfeiture of the conditions of a perpetual lease. In addition to the reservation of an annual rent, it was provided that in case the party of the second part was minded to sell the farm, he should first offer the pre-emption to the party of the first part; and that the party of the second part should not sell without leave first obtained from the party of the first part, under his hand and seal, and on every such sale so obtained, was to pay to the latter a *tenth* part of the money for which said farm should be sold. The lessee assigned the lease and premises without any license from the lessors, and without offering the pre-emption and refusal to them, or paying them the one-tenth of the price of such assignment. A verdict was taken for the plaintiff by consent, subject to the opinion of the Supreme Court, which gave judgment for the plaintiff. The judges, however, assigned different reasons for their respective opinions. Mr. Justice PLATT placed his decision upon the ground that all the violated conditions were lawful, and held that a reservation of a tenth sale was valid. Chief Justice SPENCER said he thought the plaintiff was entitled to judgment "on the ground that the condition giving the lessor a right of pre-emption, is a lawful condition; and not having been complied with, the forfeiture had been incurred." And he added, "that on the other parts of the case it was not necessary, nor did

he mean to express any opinion." No doubt has been entertained of the correctness of the judgment rendered in that case, because the condition giving the right of pre-emption was lawful. It was not necessary that the court should go further and express an opinion upon the validity of the other conditions, nor did they do so. I think it clear, therefore, that the reasons assigned by Mr. Justice PLATT, was his own opinion only, and not the opinion of the court.

This case last cited, is the only one I have found in the reports of this state, where any judge has discussed, or expressed an opinion upon, the validity of such reservation in a lease in fee. In all the other cases, the question has arisen on leases for lives or for years.

In *Jackson ex dem. Schuyler v. Corlis*, (7 John. R. 531,) a lease for 21 years contained a quarter sale reservation on which ejectment was brought, the premises having been sold under an execution issued on a judgment confessed by the lessee. The court held that the covenant applied only to voluntary sales; and it not appearing that the judgment was fraudulently confessed, judgment was given for the defendant.

*Jackson ex dem. Stevens v. Silvernail*, (15 John. 277,) was ejectment upon a lease *for lives*, with a covenant not to sell without permission of the lessor, and a clause of forfeiture for non-performance of covenants; and it was decided that a lease of part of the premises for 20 years was not a breach of the covenant, and that nothing short of an assignment of the whole estate would work a forfeiture. It was also held, that a sale of the whole premises under a judgment and execution would not work a forfeiture, there being no fraud or collusion on the part of the lessee.

*Jackson ex dem. Livingston v. Groot*, (7 Cowen, R. 285,) was also ejectment upon a lease *for lives*, and the only question was whether the premises were forfeited by violating the covenant of tenth sale. The court held the covenant valid, and that it extended to every voluntary alienation, whether by the lessee or his assigns.

The next case was that of *Jackson ex dem. Livingston v. Kipp*, (3 Wend. R. 230,) which was also ejectment upon a lease *for lives*, where the Supreme Court reiterated the doctrine that a fifth sale covenant was not broken by a *bona fide* sale of the premises under an execution.

In *Livingston v. Stickles*, (8 Paige R. 398,) it was covenanted, in a lease *for lives*, that the lessee should not dispose of his estate without the written consent of the lessor, and that on every such sale he should pay to the lessor the tenth part of the purchase-money. The lessee contracted to sell the premises, indemnifying against the lessor's claim for the tenth sale, and the purchaser took possession, paid the principal part of

the purchase-money to the lessee, but received no actual transfer of title. A bill filed to enforce the payment of the tenth sale was dismissed by the chancellor, on the ground that the remedy, if any, was at law and not in equity. In giving his opinion, the chancellor said, "I prefer to put my decision in this case, distinctly upon the ground, that these agreements in the nature of fines upon alienations, are inconsistent with the spirit of our free institutions, and injurious to the community. And although this court has no right to interfere with such contracts, so far as the laws of the state sanction their validity, it ought not to interpose its extraordinary jurisdiction to enforce the rights of the landlord, in cases where he has not by his contract secured to himself a legal right, as contradistinguished from an equitable claim, to enforce a hard bargain for which the law gives him no right of action." That decree was affirmed in the Court for the Correction of Errors, (7 Hill, 253,) upon the ground that the lessor's right to be paid the tenth sale was incomplete, the lessee not having parted with his legal interest in the premises, and that the former was entitled to no aid in equity. In giving his opinion in the Court of Errors, Ch. J. NELSON, remarked, that "these covenants, though in restraint of alienation, have been repeatedly held lawful and binding upon landlord and tenant," and cited *Jackson v. Silvernail*, (15 John. R. 278;) *Jackson v. Schutz*, (18 John. R. 174,) and *Jackson v. Kipp*, (3 Wend. 230.) And again he said, (page 257,) that "in *Jackson v. Schutz*, (18 John. R. 174,) the covenant was a good deal discussed and its legality established." These general remarks, without a careful examination of the cases thus cited, might create a very erroneous impression. I have already shown that *Jackson v. Schutz*, decides nothing as to the legality of such a covenant; and that all the other cases cited, arose on leases *for lives or for years*. As the case of *Livingston v. Stickles*, did not arise on a lease in fee, it was not necessary for the learned Chief Justice to distinguish between the case of *Jackson v. Schutz*, and the other reported cases.

I have thus reviewed all the cases in the reports of this state, where suits have been brought to enforce a forfeiture of the land for non-payment of quarter, sixth and tenth sales. In every instance, the suit was brought upon leases *for lives or for years*, with the single exception of *Jackson v. Schutz*, where the question was on a lease *in fee*. In *Livingston v. Stickles*, the chancellor said, "these covenants and conditions in restraint of the alienation of *leasehold* property have been sustained by the courts, while they have been considered absolutely void in conveyances *in fee*." It is evident this language was used by the chancellor

with reference to the lease for lives then before him, and that he did not intend to include leases in fee in the general term "leasehold property."

It is now well settled, and was conceded on the argument, that reservations in the nature of fines upon alienation are valid in leases for lives and for years; but even in such leases, our courts have always held, as appears by the cases above cited, that nothing short of a violation of the covenant on the most literal and rigid interpretation, would subject to a forfeiture. Nor have the English courts been less solicitous to protect against such injustice. (See *Crusoe v. Bugby*, 3 Wils. 284; 2 Wm. Bl. 776; *Doe v. Hogg*, 4 Dowl. & Ryl. 226; *Fox v. Swan*, Styles, 482; *Doe v. Bevan*, 3 Maul & Sel. 353; *Doe v. Carter*, 8 Durn. & East. 57. 300; *Doe v. Powell*, 3 Barn. & Cres. 308; *Doe v. Payne*, 1 Stark R. 86; Platt on Cov. 407, 414; *Church v. Brown*, 15 Ves. 265.)

Having come, therefore, to the conclusion that the question whether such a condition is valid in a lease in fee has not been decided in this state, I proceed to examine it on its merits by the test of common law rules and statutory enactments.

It is first necessary to understand the precise legal character of the instrument in which the sixth sale was reserved. We speak of it ordinarily as a lease, and we call the parties to it lessor and lessee. This is proper, because a perpetual annual rent is reserved, with the right of re-entry for non-payment. But these words do not convey an adequate idea of it. It is a grant of an estate of inheritance, or a fee simple. The conveyance was to the party of the second part, his heirs and assigns forever. The words of perpetuity necessary, as the law stood at the date of the instrument, to convey an estate of inheritance were thus used "Tenant in fee simple is he who hath lands or tenements to hold to him and his heirs forever," (Litt. Ten. 1.) It is not a fee simple absolute, but a fee simple conditional—the estate depending on conditions subsequent.

Blackstone says (2 Black. Com. 81,) "if a man grant an estate in fee simple, reserving to himself and his heirs a certain rent; and that if such rent be not paid at the times limited, it shall be lawful for him and his heirs to re-enter and avoid the estate. In this case, the grantee and his heirs have an estate upon condition subsequent, which is defeasible if the estate be not strictly performed." And this definition is now substantially recognized by the Revised Statutes (1 R. S. 717,) which provides that "every estate of inheritance, notwithstanding the abolition of tenures, shall continue to be termed a fee simple or fee." When not defeasible or conditional it is termed a fee simple absolute.

The estate conveyed is also a *freehold*, that term applying equally to an estate of inheritance and an estate for life, (4 Kent Com. 23; 2 Bl. Com. 8, n 4.)

It is objected that the condition is repugnant to the grant of a leasehold estate in fee in the same instrument, and is therefore void.

"Conditions are void when they stipulate for what is repugnant to the language of the grant: as that a man who is a lessee to him and his assigns shall not assign; or, that which is repugnant to the estate: as that a tenant in tail shall not suffer a common recovery; or, that which is against the policy of the law: as an unreasonable restraint on trade, on marriage, on the power and right of alienation or a stipulation which is immoral," (2 Preston on Abstracts of Title, 198.)

The general rule on this subject is thus stated by Chancellor Kent: "Conditions are not sustained when they are repugnant to the nature of the estate granted, or infringe upon the essential enjoyment and independent rights of property, and tend manifestly to public inconvenience. A condition annexed to a conveyance in fee or by devise, that the purchaser or devisee should not alien, is unlawful and void. The restraint is admitted in leases for life or years; but it is incompatible with the absolute right, appertaining to an estate in tail or in fee. If the grant be upon condition that the grantee shall not commit waste, or not take the profits, or his wife not to have her dower, or the husband his curtesy, the condition is repugnant and void, for these rights are inseparable from an estate in fee," (4 Kent Com. 113.) Lord Coke says this rule applies to a devise, "grant, release, confirmation, or any other conveyance whereby a fee simple doth pass," (Co. Litt. 223, a.) And that the case put by Littleton of a feoffment of land is only by way of example; for if a man be seized of a signory, or a rent, or an advowson, or common, or any other inheritance that lieth in grant, and by his deed granteth the same to a man and to his heirs upon condition that he shall not alien, it is void," (Co. Litt. 223.)

The rule is laid down in Sheppard's Touchstone, as follows: "If the condition be that the feoffee or grantee shall not alien the thing granted, to any person whatsoever, or that if he do so alien to any person, that he shall pay a fine to the feoffor, these conditions are void as repugnant to the estate," (Shep. Touch. 129; Co. Litt. 223.)

It was indeed held that a grantee might be restrained from alienating for a particular time (2 Leon. 82; 3 Leon. 182;) and to a particular person named in the conveyance, (1 Shep. Touch, 129.) But Chancellor Kent thought it very questionable whether even such a condition would be held good at this day, (4 Kent Com. 131.) In *Bragg v. Tan-*

ner, decided in B. R. 19, Jac. 1 (1622,) it was held by Justices Doddridge and Chamberlain, that if a feoffment be on condition that if the feoffee alien, he shall pay £10 to the feoffor, that this is a good condition. But the Ch. Justice and Justice Houghton held the contrary, "for then this shall be a circumvention of the law." The manuscript case is referred to in Shep. Touch. 129. In case of leases for lives and for years, the restraint is permitted, because by the provisions of the lease the property is the revert to the lessor at the expiration of the term. (Co. Litt. 223, a.)

In the case under consideration, the whole estate was granted in fee. None remained in the grantor. He retained no interest on which a judgment would have been a lien. (*Payn v. Beal*, 4 Denio, 405.) This case overruled that of *The People v. Haskins*, 7 Wend. 463, where a contrary doctrine was held. The same question had been discussed, but not decided, in the late Court for the Correction of Errors, in *Huntington v. Forkson*, 6 Hill, 149.

It is said that in this case the estate may be terminated by the re-entry of the grantor for non-payment of rent. But it is no estate in the grantor, that he may by possibility have the right to re-enter for breach of a condition subsequent. "If A. has only a possibility of reverter, as in the case of a qualified or conditional fee at common law, he has no reversion." (4 Kent. Com. 353; 2 Preston on abstracts, 83.) To authorize him to impose a restraint upon alienation, he must have a right to the reversion of the estate by its limitation, which Littleton calls a condition in law. (Litt. § 380; 1 Just. 234; 4 Black. Com. 155.) In the latter case the estate reverts when the contingency happens, without any act done by the person in expectancy. In the former case the law permits the estate to endure beyond the time when such contingency happens, unless the grantor or his heirs or assigns take advantage of the breach of the condition, and make either an entry or a claim in order to avoid the estate. (Litt. § 347; 4 Black. Com. 125.)

There is no difference in principle between a condition that the lessee in fee shall not convey, and a condition that, when he conveys, he shall pay to the lessor one-sixth of the purchase-money. Both are in restraint of alienation. The first controls absolutely the whole estate, the last but one-sixth part of it. When the farm shall have been six times sold, its whole value will be surrendered, though every condition shall have been performed. Such conditions differ only in degree. If the latter could be sustained, it would only be encouraging an evasion of the rule that declares the former void.

I do not think it necessary to enquire what was the common law of



England on this subject previous to the passage of the statute of *quia emptores*, &c. in 1829, 18 Ed. 1 ch. 1; or if the common law was modified by that act, whether that act was ever in force in this country. (1 R. L. 41; 18 John. R. 179.) The statute *quia emptores* was virtually re-enacted in this state in the first section of the act concerning tenure, passed 20th February, 1787, which enacts that "it shall forever hereafter be lawful for every freeholder to give, sell or alien the lands or tenements whereof he or she is, or at any time hereafter shall be seized in fee simple, or any part thereof, at his or her pleasure, so always that the purchaser shall hold the lands or tenements so given, sold or aliened of the chief lord, if there be any, of the same fee, by the same services and customs by which the person or persons so making such gift, sale or alienation before held the same lands and tenements." The common law exists here under the same statutory modification as in England.

I think, therefore, that the whole estate having been granted in fee, the restraint imposed upon alienation was repugnant to the grant, and is void, and the void condition being a condition subsequent, the estate stands divested of the condition. (1 Shep. Touch. 129; 3 Com. Dig. 97, condition D.; 5 Co. Litt. 226 b, 223 a.)

2. It is also insisted by the defendant's counsel that the sixth sale reservation was a fine for alienation, in contravention of the act abolishing fines for alienation, and was therefore void.

Fines for alienation were abolished in England in 1660, by 12 Chas. 2 chap. 24. The only exceptions made by that statute were of the king's tenants *in capite* and of the tenure by "copy of court roll," usually called "copyhold estates." That tenure was founded on immemorial custom, which was different on different manors, and has never existed in this country. Even in copyhold estates the fine upon alienation is now limited in England to two years improved value of the estate. (4 Black. Com. 77; 2 Ch. R. 134.) At the time of the passage of that statute, this state was a Dutch province, and did not become an English colony till 1664. The second act of the first colonial Legislature ever held in the province was designed to divest tenures of all feudal incidents, and especially all fines and restraints upon alienation. It was passed in April 1691, and provided "That all lands and heritages within this province and dependencies, shall be free from all fines, licenses upon alienations, and from all heriots, wardships, liveries, primiers, seizins, year and day and waste escheats, and forfeiture upon the death of parents and ancestors, natural, unnatural, casual and judicial, and that forever; cases of high treason only excepted." (Bradford Colonial Laws, 1, 4.) But that act was six years afterwards repealed by the English crown. In 1787,

however, on the organization of the state government, the "act concerning tenures" was passed, by which all feudal services and incidents were abolished by name, and which provided that "all *fin*es for alienations, seizures and pardons for alienations, tenure by homage and all charges incident or arising by reason of wardship, livery, &c. &c., shall be and hereby are likewise declared to be taken away and discharged, from the said 30th day of August, 1664."

This statute was in operation when the lease in question was executed. It was repealed by the Revised Statutes, (3 R. S. 129,) and sections 3 and 4, 1 Revised Statutes, 714, were substituted in its place. The third section declares all lands within this state to be allodial, subject only to the liability to escheat, and that the entire and absolute property is vested in the owners according to the nature of their respective estates, and that all feudal tenures of every description, with all their incidents, are abolished. The 4th section provides that the abolishing of tenures should not take away or discharge any rents or services certain, which had been or might be created or reserved, &c. The very learned and able revisers expressed the opinion that the act of 1787 was unnecessary, and that no feudal tenures had existed here before its enactment, (Reviser's notes, 3 R. S., 2d ed. 564.) The correctness of this opinion was questioned on the argument by the defendant's counsel, who claimed that feudal tenures had existed here and were of Dutch origin, (1 O'Callaghan's Hist. New Neth., 117, 118, 120, 127, 197, 201, 235, 236, 325, 326, 435-6, 445-6, 456, 466; 2 id., 250-1, 179; Hallam's Middle Ages, vi. ch. 2, part 1, p. 76, 80, 352, note; Sheller's Revolt of Neth., ch. 1 and 2; 1 Robertson, 188, &c. n.; 8 Litt. Ten., § 185; 2 Black. Com. 54; Jac. Law Dic., title "Courts Baron," "Purveyor." Hallam's Mid. Ages, 6 ch., 2 part, p. 352; id., 80, 424, 90, 78.) If the act of 1787 was unnecessary, the provision of the Revised Statutes, abolishing all feudal tenures of every description, with all their incidents, must have been equally so.

It is insisted that the 6th sale reservation is not a "fine for alienation," within the language of the act of 1787; and that the statute was intended to apply only to such fines as are incident to feudal tenure, and not to a sum of money agreed to be paid by a purchaser on a subsequent sale. Sheppard says "a fine was taken for an income or a sum of money paid at the entrance of a tenant into his land," (Shep. Touch. 1.) A fine for alienation was originally an attendant or consequence of tenure by knight service. The fine became due to the lord for every alienation, whenever the tenant had occasion to make over his land to another, (4 Black. Com. 55.)

If not technically a fine upon alienation, the sixth sale reservation is in the nature of a fine upon alienation. Such is the language generally used by our courts with reference to such a condition. If there were no feudal tenures nor their incidents here, then that part of the act of 1787, abolishing fines for alienation, has no practical application, unless it applies to a condition like this. When Sheppard says, "if the condition be that if the feoffee do alien he shall pay a fine to the feoffor, the condition is void," (1 Shep. Touch. 129,) he certainly uses the word as applicable to a sum of money agreed to be paid on alienation, and in a sense broad enough to extend to this sixth sale reservation. I do not see how what was once abolished by statute when it existed, if at all, as an incident of feudal or military tenure, can be virtually restored by an agreement between the parties.

A sixth sale reservation, if not a fine for alienation within the letter of the statute is certainly an evasion of its spirit and fraught with all the evils intended to be corrected by it.

3. It remains to consider whether the condition is void on the ground that it is against public policy.

I do not deem it necessary to a decision of this cause to go into an examination of the feudal system, its origin, its history and its consequences upon the present tenure of land. It is enough to say, it was a system originating in a military age, and well adapted to its necessities; but utterly unsuited, every vestige of it, to the institutions under which we live, and to the personal independence and equality of political rights enjoyed by our citizens. The tenant no longer looks to his lord for protection against lawless aggressions, nor does the lord depend upon the military services of his tenant. There are no longer courts baron, nor homage, nor fealty, nor knight service. The reasons why neither the lord nor the tenant could change their relations with each other without mutual consent, ceased, centuries ago, with the necessities which imposed them. The progress of man in intelligence, in knowledge, in the arts of peace and in political advancement, now calls for tenures in accordance with perfect political equality, and entire personal freedom; and if there be vestiges of feudal tenure still remaining here, they should be eradicated as speedily as is consistent with a strict regard to the rights of property of those concerned.

Quarter sales, sixth sales, and tenth sales, and all fines for alienation or sums required to be paid in the nature of fines upon alienation have long been regarded as prejudicial to the public interests. Some of their evils are well stated in a report made to the Legislature by Messrs. Spencer and Van Ness in 1812, (see Assembly Journal of 1812, page 110.)

It is the policy of the law that lands shall not be withdrawn from commerce ; but these conditions tie up estates by a species of perpetual entail, from which a temporary relief can only be obtained by the payment of a very large price for the indulgence. By the common law, the right of alienation could not be suspended for a longer time than twenty-one years and nine months, after a life or lives in being ; and the Revised Statutes do not allow the absolute power of alienation to be suspended by any limitation or condition whatever, for a longer period than during the continuance of two lives in being at the creation of the estate. But here is a restraint upon alienation to continue for all future time. As often as the owner shall find it necessary to sell, age after age, and century after century, at every alienation, one-sixth of the purchase-money must be paid to the remote representatives or assigns of the lessor. After twelve alienations, they will have received twice the improved value of the farm, in addition to the price paid on the original purchase. Yet their claim will be in no respect lessened—the demand will be insatiable—its existence interminable.

Such conditions have the effect of preventing a change of occupation. They require the son to live upon, and cultivate the same farm his father has tilled, though he may be unfitted for the employment, and may have been designed by nature for some other calling better adapted to his taste and capabilities. He is denied the opportunity to go abroad into the world to reap the rewards of his enterprise and industry, except at the sacrifice of a large share of the estate made valuable by the toil and industry of his fathers. In a land where the professions and trades are open to all, he is subjected to all the discouragements of caste. A freeman and a freeholder, he is not at liberty to dispose of his own property.

Such conditions depreciate the value of property and discourage industry. It can hardly be supposed a purchaser from the tenant will pay the full value for a farm, when he knows he will be under the necessity of giving to a landlord one-sixth of what he shall receive, whenever he shall be disposed to sell it again. Nor will an owner consent to make permanent improvements or valuable erections, subject to such a loss on them by alienation. The improvement of the country is largely concerned in defeating a condition thus charged upon land for all time to come.

I think no person can be found the advocate, and few persons the apologists, of such a condition, at the present day ; a condition so unconscionable, that the cases are exceedingly rare, in which the landlord has ever sought to enforce it, and so odious, that a distinguished writer in the *American Review*, (2 *Am. Rev.* 593,) says, " after a new owner

had come into possession, having paid the full value of the property, if he should have occasion to sell again for the like value, we should envy no man his conscience or his character, who, under this provision would take from him the full quarter part of his purchase.

It is said that this condition formed a substantial part of the consideration for which the grant was made. If this were so, it would not affect the legal question. Where a physician covenants, in consideration of \$1000 paid to him, never to practice medicine again in the state, the covenant is void notwithstanding the consideration, as being in restraint of trade and against the policy of the law, (*Nobles v. Bates*, 7 Cowen, 307; 7 Mod. 230; 10 id. 27, 85, 130; 2 Saund. 156, a. n. 1.) But though in law this condition is regarded as a part of the consideration for the grant, it was esteemed of but little value when the lease was executed. Upon this subject Messrs. Spencer and Van Ness, say, in their report above referred to, "covenants and conditions, which coerce the tenant to pay a penalty for leave to change his residence, are generally without consideration; for it cannot be pretended that in settling terms of the lease, the landlord took a lower rent on the contingency that his tenant would change his mind and become disposed to part with his lease. It may also be remarked, that the tenant in entering into stipulations to pay a fine or a quarter sale, or alienation, does so under circumstances which may induce him to believe he will never be disposed to alienate; but his circumstances change, and a variety of unforeseen causes impel him to a change of residence. It can never be right to suffer a landlord who is not prejudiced by the alienation of his tenant, to grasp a part of his earnings for his yielding to imperious circumstances, or for his changing his mind."

It is within the legitimate scope of judicial inquiry to ascertain whether such reservations are against public policy; and I have, therefore, thought it proper to look somewhat into their nature and character. Upon this question it seems to me, there is no good reason for a difference of opinion.

I need not here repeat the authorities bearing upon this question, which I have referred to under the first point. Upon both principle and authority such a condition is condemned as against the policy of the law. I think there should be a new trial, costs to abide the event.

New trial granted.

NOTE.—Although the four preceding decisions are not, strictly speaking, practice cases, yet the practical importance of their *early* publication, at least to a portion of the state, may be deemed a sufficient reason for their being inserted in this number, to the exclusion of other matter.

## SUPREME COURT.

## HARVEY M. MIXER vs. SAMUEL KUHN.

A motion to change the place of trial cannot be made *before* issue joined. So held, by the whole court, in the eighth judicial district. (*The case of Barnard v. Wheeler*, 3 How. Pr. R. 73; *Beardsley v. Dickerson*, ante, page 81; *Lynch v. Mosher*, ante, page 86; *Myers v. Feeter*, ante, page 240; and *Schenck v. McKie*, ante, page 246, commented upon and explained.)

*Chautauque Special Term, May, 1850.*—The venue in this case is laid in the county of Erie. This motion is made for an order changing the place of trial to the county of Chautauque, for the convenience of the defendant and his witnesses. An answer has been served containing new and special matter, but no reply has been served, and the time to reply had not expired.

The plaintiff's counsel takes the preliminary objection that a motion to change the place of trial cannot be made till after the issues are joined. He cites *Barnard v. Wheeler*, 3 How. Pr. 73; *Beardsley v. Dickerson*, 4 id. 81; and *Lynch v. Mosher*, 4 id. 86.

The defendant's counsel cites *Myers v. Feeter*, 4 How. Pr. R. 240; and *Schenck v. McKie*, id. 246.

GEO. BARKER, *for the defendant.*

JOHN GANSON, *for the plaintiff.*

SILL, Justice.—Before the Judiciary Act of 1847 took effect, it was (as is now conceded) the settled rule of practice that a motion to change the venue for the purpose of changing the place of trial, might be made before the issue was joined, and if necessary to prevent delay, the defendant must move at the earliest practicable period after the declaration was served.

Whether any of the provisions of the Judiciary Act implied a change of the practice in this respect, or rendered any change expedient, it is not necessary now to inquire. Whatever that act may contain tending to such a conclusion, the same reasons, with others much more cogent, are found in the Code of Procedure.

The case of *Schenck v. McKie*, (4 How. Pr. R. 246,) holds that neither of these enactments furnishes any reason for a departure from the former practice, as to the time of making the motion to change the place of trial; and Judge WILLARD, in that case, says that this question was not involved or decided in either of the preceding cases of *Barnard v. Wheeler*, 3 How. Pr. R. 73, or *Lynch v. Mosher*, 4 id. 86. These

cases were understood as embracing and deciding the question now presented, and the learned judge certainly is mistaken in supposing that it was not decided in the first case.

It appeared in *Barnard v. Wheeler*, that the issue was not joined, and the counsel for the plaintiff objected that the motion was for this reason premature. Judge HARRIS, in delivering the opinion, mentions this as a point in the case, involving a construction of the Judiciary Act in relation to the change of venue, and therefore "important to consider," and he says "*the cause is not at issue*, and therefore, if the notice were sufficient, *the motion itself is premature*." That there were other points decided in the case, which would have disposed of the motion the same way, does not prove that this one was not properly raised, or that the judge travelled out of the case in deciding it.

In *Lynch v. Mosher*, it appeared that two special terms had been held in the district where the venue was laid, after the complaint was served and before the issue was joined, and that there was time after the service of the complaint to have given a notice of motion at either. By omitting to make the motion to change the place of trial at one of those terms, the plaintiff contended that the defendants had been guilty of laches, and that his application at a subsequent term should not be entertained.

To this objection the defendant answered that, under the present system of pleading, the motion to change the place of trial could not properly be made till all the pleadings were served. There were other laches also charged upon the defendant, but from these he claimed, and so it was held he might, under the circumstances of the case, be, upon terms, relieved. But if the motion could properly be made before issue, it was not pretended that the defendant had excused his neglect to make it at an earlier day. This appeared to me to present the same question now under consideration, and it was argued by counsel, examined carefully by me, and decided.

If the learned judge is right in supposing that I mistook the question before me for decision, still, the examination I then gave the matter satisfied me that, under the present system of pleading, no person can properly or safely make the requisite affidavit upon which to move to change the place of trial, or to oppose such motion until he knows what facts are admitted and what controverted in the case; that this should be known by both parties before they can be prepared, as honest men, to speak upon oath as to the necessity of the testimony of particular witnesses, to enable them to proceed to try the issues in the cause; and I have, since the case of *Lynch v. Mosher*, repeatedly so decided.

The case of *Beardsley v. Dickerson* (4 How. Pr. R. 81,) arose under the Code of Procedure, and the objection was there taken that the cause was not at issue and the motion premature. It appeared that an answer containing special matter had been served, to which there had been no reply. But the time for replying had expired, and hence all the issues in that cause arose upon the complaint and answer; the special matter in the latter being admitted for want of a reply. It was properly held that the objection was not founded in fact, and that the question did not then arise; still the manner in which the subject was treated by Mr. Justice PARKER implies his assent, I think, to the doctrine, that the motion should not be made until all the pleadings are served.

In the case of *Clark v. Pettibone* (2 Code Reporter, 78,) Judge EDMONDS decided that the motion should not be made until after the issues were joined, and on this ground denied a motion to change the place of trial with costs.

In *Myers v. Feeter* (4 How. Pr. R. 240,) the learned judge said that the defendant, after the service of an answer, might move to change the place of trial before the expiration of the time to reply, but the decision which he felt constrained to make, goes far to establish the position taken by the plaintiff on this motion. There the plaintiff showed that the answer contained new and material matter, and he could not yet determine what witnesses might be required upon the trial of the issues. For this reason the motion was denied without prejudice to its renewal after the reply should be served.

The same reason for denying the motion is likely to exist always, when it is made before issue; showing that in such case the result is involved, irrespective of the merits, in uncertainty, and the defendant will be frequently put to the trouble and expense of making two motions to obtain an order, which most clearly, if the cause is in readiness for it, requires but one application.

But to my mind there were other and conclusive reasons for the decision in *Myers v. Feeter*. Until the reply came in, or the time to reply expired, the defendant could not know whether the special matter in the answer would be admitted or denied, and, if a conscientious man, he could not swear that it was unsafe for him to proceed to trial without witnesses to prove it. Nor could he know whether the reply would contain special matter which would require testimony on his part to rebut or explain.

So stand the authorities on one side of this question, and on the other is the case of *Schenck v. McKie*, above cited.



It is not contended that the Code of Procedure contains any provision designed directly to settle or control the point of practice now examined, but it is contended that the great change in the rules of pleading introduced by this statute, has made it necessary that the contents of the pleadings shall be known to the parties, before either can know what witnesses he will require on the trial.

This opinion was expressed and some reasons briefly given for it in *Lynch v. Mosher*. On the contrary, it is said in *Schenck v. McKie*, that "*it can be known as well by the defendant before as after issue, what facts will be material for him to prove on the trial.*" He knows, it is further said, what facts in the complaint he intends to controvert, and what he expects to set up in his answer, and his affidavit must disclose his defence to the other party.

Although the defendant may know the contents of the complaint, and what he designs to answer to it, still it is not easy to perceive how the defendant can know that he will need witnesses to prove his answer before he knows that it will be denied, or how he can anticipate the testimony necessary to meet a special reply, before he is apprised what the reply will contain.

Nor does the 48th rule, as has been said *require* the defendant to disclose in his affidavit the matters which he intends to set up in his answer. *He may do so*, but if he prefers to omit it, or make only a partial disclosure of his intended defence, how can the plaintiff determine before he sees the answer, what witnesses he will need to meet it.

Since the case of *Delavan v. Baldwin* (8 Caine's Rep. 104,) was decided, the only reason for requiring a defendant to move before issue to change a venue, has been to avoid delay. The adoption of a new judiciary system has almost entirely done away with this reason for the rule. When non-enumerated motions were made at general terms, of which there were but four in a year, judgment could be entered in term time only; and as late as 1845, there were only four terms in a year at which non-enumerated motions could be made, (Rule 48 of Sup. Court, 1845.) Now the almost weekly recurring special terms, the greater frequency of the circuit courts, and the law permitting judgments to be entered upon the coming in of a verdict at the circuit, have done away with what was before rather an excuse than a reason for moving for an order relative to the trial of an issue, before any issue existed. There will be a few cases in which the plaintiff will be delayed, by postponing the motion till the pleadings are served, and serious delay will not be likely to happen in any.

It has been said that the 47th rule implies that the motion shall be made before issue is joined, though it is not contended that this or any other rule provides in terms for this case. When the rule referred to was adopted, the question under consideration was not mentioned, and probably was not thought of. I am satisfied, that the members of the court did not intend to express an opinion upon the question, and have no doubt that the rule was adopted, without observing its want of adaptation to the changed state of the practice.

The motion must be denied, without prejudice to its renewal after issue joined, but the defendant having been induced to make the motion in this stage of the case by the decision in *Schenck v. McKie*, it must be without costs.

NOTE.—Justices MULLIN, MARVIN and HOYT, to whom the foregoing opinion has been submitted, concur in it.

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## SUPREME COURT.

ALFRED COBB and others agt. BENJAMIN FRAZEE.

A demurrer will not lie to a part of an entire defence. As, where the plaintiff selected from the answer several sentences, forming a part of the statement of one entire ground of defence, and demurred to that, and replied to the residue; demurrer was overruled. (See *Slocum v. Wheeler*, ante, page 373.)

*Onondaga Special Term, May, 1850.*

Mr. ANDREWS, for plaintiff.

Mr. CARPENTER, for defendant.

GRIDLEY, Justice.—This is a demurrer to a part of an answer. The plaintiff's counsel has selected from the answer several sentences, forming a part of the statement of one entire ground of defence, and demurred to them; while he has replied to the residue of the answer. And the question is not whether the matter demurred to is "*irrelevant and redundant*," and subject to be stricken out, on motion, under the 60th section of the code; but whether the plaintiff can demur *except to an entire defence*.

The determination of this question must depend on the provisions of the code. By section 150, it is enacted that "the defendant may set forth by answer as many defences as he may have; but they must be separately stated. By section 153 it is provided that the defendant may plead any matters not inconsistent with the complaint, in avoidance of the answer or of any defence set up therein; or he may demur to the

*same* for insufficiency, stating in his demurrer the grounds thereof. Now it is quite clear that the words "*the same*," mean the "*answer*" or "*any defence set up therein*." But if there were any doubt on this point, the next section removes it; for that provides, in express terms, that "the plaintiff may demur to *one* or *more* of several defences set up in the answer, and reply to the residue. The demurrer is not a substitute for the exception of insufficiency in chancery; but it is a mode of objecting to an entire defence on legal grounds, and in that respect is analogous to a demurrer to a plea, under the old common law practice. The separate grounds of defence, separately stated, as prescribed in section 150, take the place of separate pleas.

The defendant might have moved to strike out the demurrer, and that would have been the most correct practice; but both parties have come here to argue the demurrer, and, on examination, it turns out that the demurrer will not lie to a part of an entire defence. It must therefore be overruled.

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## SUPREME COURT.

### ANONYMOUS.

Where a piece of real estate was ordered to be sold for the benefit of *five* infant children, and the guardian gave to each infant a separate bond, under rules 65 and 63, with the *same* sureties, who justified in each case according to the penalty of each bond—being different in amount. *Held*, that such justification was not in accordance with the spirit of the rules of the court, although it might conform to the letter. The sureties being the same in each case, they should have justified in respect to their ability, as to the *aggregate penalties* of the several bonds.

*Before SILL, Justice, at chambers, July, 1850.*—An order was made at a special term, pursuant to rule 65, appointing a guardian to sell a piece of real estate, belonging to five infants. It directed separate bonds to be given by the guardian to each of the infants with sureties, and fixed the penalties respectively at \$925, \$1130, \$1242, \$1475, and \$1675. Bonds executed in the form prescribed by this order are now presented for approval; the same persons being sureties on all. Endorsed on each bond is an affidavit of the sureties, each of them swearing that he is worth the sum specified as the penalty of such bond, over and above all debts and liabilities, which he owes or has incurred.

SILL, Justice.—The 63d rule requires that each of the sureties on a bond of a guardian to sell the real estate of infants, shall be worth the

penalty of the bond over and above all his debts; and the form of the affidavit of justification is indicated by the 76th rule. These rules, it is said, and perhaps truly, have been literally complied with in the present case, for the sureties have made an affidavit on every one of these bonds, in which each of them swears that he is worth a sum as great as the penalty mentioned in it, over and above all debts and responsibilities which he owes or has incurred.

Under the circumstances of the case, however, this is not a compliance with the spirit of these rules. Their design was (it is scarcely necessary to say) to provide ample security to every infant whose property should be sold under the order of the court, for the faithful discharge of his duties by the guardian appointed to make the sale. When these affidavits of justification were made, no one of these five bonds were filed, or delivered, so as to make it the foundation of any debt or existing liability of the sureties. When justifying as sureties on the bond of one infant, no liability had been incurred on the bonds to the others. The affidavits may therefore all be true, and yet these sureties not be competent to become so in a sum exceeding \$1675, the penalty of the largest bond.

To make them competent as sureties on all these bonds, they should be worth \$6,447, the aggregate penalties of all, over and above their debts and other liabilities.

One of these bonds might be approved, but as to the other four there must be other sureties, or a further justification.

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## SUPREME COURT.

### RUTH HULBERT vs. THE HOPE MUTUAL INSURANCE COMPANY.

*Erie General Term, April, 1850.*—MULLET, *Presiding Justice*; SILL, MARVIN and HOYT, *Justices*.—Appeal from an order made at a special term, denying a motion to set aside a summons upon the ground that the court had no jurisdiction. (See report of the decision, 4 How. Pr. Rep. 275.)

The order made at the special term was affirmed, and the opinion delivered then by Sill, J. concurred in as the opinion of the whole court.

NOTE.—It will be noticed that the motion made in this case at special term, was to set aside a *summons*. The decision on such a motion is not ordinarily appealable. But this involved the merits from the fact that it was a question of *jurisdiction*, calling in question the validity, as a law, of a part of the code.

## SUPREME COURT.

## N. S. HOWARD vs. THE ROME AND TURIN PLANK ROAD CO.

A trial of a cause which occupies four or five days, and in which it is necessary to procure scientific witnesses to disputed questions, comes within the meaning of § 308 of the code, as *extraordinary*, and entitled to an extra allowance.

*It seems*, that any trial which necessarily occupies four or five days, may be considered as of *unusual length*, and therefore *extraordinary* within the meaning of § 308, if the action is one of those enumerated in that section.

*Oneida Special Term.*—Motion for an allowance under the 308th section of the code.

E. A. BROWN, *for the motion.*

C. COMSTOCK, *opposed.*

GRIDLEY, Justice.—When the Legislature abolished “all statutes establishing or regulating” the costs or fees of attorneys, solicitors and counsel, in civil actions, and prescribed the same rate of compensation for a party, whose cause would not occupy an hour in the preparation and trial of it, as for one who would be obliged to spend days in preparing; where witnesses would be summoned from distant parts, and where counsel would be employed many days in its trial; they foresaw that cases might occur, in which justice would demand an additional allowance of costs. The accordingly enacted that the “court might, in *difficult* or *extraordinary* cases, make an allowance of not exceeding ten per cent. on the recovery or claim.

In this case it appears that the action was brought to recover a claim for building the defendants’ road; that the trial before a referee occupied from four to five days, and that a question arose, whether a large portion of the excavation was what is called hard-pan; and if so, what amount of it came under this denomination. The plaintiff was obliged to employ engineers of skill to go on to the track of the road and measure the number of square yards of this material, which had been removed in leveling a long and precipitous hill.

This is a clear case for the allowance. The fact that the trial lasted four or five days, is enough to render it “*extraordinary*,” within the meaning of the statute. It was of *unusual length*, and the expense of the plaintiff would be proportionably increased. Again, the plaintiff paid over thirty dollars to engineers for their services in measuring the amount of the material removed called hard-pan, and for attending as witnesses on the trial. It appears that it was disputed that the material

was hard-pan ; and the quantity removed was also a litigated question. This also is a fact that entitles the plaintiff to an extra allowance. The fixed rates were intended for ordinary causes, occupying only the usual length of time, and not characterized by the necessity of procuring scientific witnesses, to make preparation for the trial, by services like those proved on this occasion.

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## SUPREME COURT.

THE PEOPLE vs. ———.

A defendant in a criminal case is bound to furnish, upon bills of exceptions, *printed* papers for a hearing, the same as in other cases.

*It seems* to be the correct practice in such cases, that the defendant intending to ask a hearing without furnishing printed papers, should, on serving his bill of exceptions, give notice to the district attorney that he will apply to the justice who presided at the trial, for a certificate of his inability to print ; and such certificate shall be evidence of such inability.

*General Term, Poughkeepsie, July 1, 1850, before MORSE, BARCULO and BROWN, Justices.*

Mr. SCRUGHAM, district attorney of Westchester, moved to strike the cause from the calendar, upon the ground that the defendants having taken exceptions, and been duly notified to prepare papers for the hearing, had failed to do so.

Mr. BAILEY, for the defendants, insisted that inasmuch as the statute (2 R. S. 27,) required the district attorney to bring the indictment with the bill of exceptions, &c., into this court, that he was thereby so far made the actor, as to be required to prepare and furnish the papers for the hearing. That in the present case an order staying proceedings had been obtained, and it was, therefore, for the interest of the public, and not of the defendants to expedite the cause in this court.

It was also insisted that to compel a poor defendant to print, as required by the rules, would be a denial of justice.

Mr. TOMPKINS, associated with the district attorney, insisted that there was nothing in the statute which authorized any departure from the ordinary rules, and that every consideration of public policy required the rule to be enforced in criminal as in civil causes.

By the Court, MORSE, Justice.—It is the duty of the defendant, making a bill of exceptions, to print the papers for the hearing, as in other

cases. No hardship can result from this rule, as it will always be in the power of the court to permit a hearing upon written papers, when it is made to appear that the defendant is unable to procure the printing. If he is of sufficient ability, there can be no reason why he should not furnish the same facilities as other parties for examining the errors which they allege have intervened.

The court suggested as a correct practice, that a defendant intending to ask a hearing without furnishing printed papers, should, on serving his bill of exceptions, give notice to the district attorney that he would apply to the justice or judge, who presided at the trial for a certificate that he was unable to print, and that such certificate should be considered the proper evidence of such inability.

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## SUPREME COURT.

JAMES W. LUSK agt. DE WITT C. LUSK and others.

A justice at special term has the power to hear and decide a motion for a new trial, on the ground that the verdict is against evidence. (*The objections to such a power of the justice, under the constitution and under the code, considered.*—GRIDLEY, Justice.) See the note at the end of this case.

*Oswego General Term, May, 1850.*—In this case a verdict was rendered at the circuit for the defendants; and the plaintiff made a case. But instead of moving for a new trial on appeal, he stayed the entry of a judgment by an order, and moved for a new trial at the special term, on the ground that the verdict was against evidence. A new trial was granted; and the defendants have appealed from the order granting a new trial. And at the same time they have moved to set aside the appeal and original order, on the ground that a single judge has no power under the constitution, or conferred by the code, to grant a new trial on the merits.

LE ROY MORGAN, *for plaintiff.*

QUINCY JOHNSON, *for defendants.*

By the Court, GRIDLEY, Justice.—1st. The first question presented on this motion is, has the *constitution* forbidden the granting of a new trial on the merits, by a single justice? It was provided by the fourth section of title fifth of the constitution of 1821, that the "Supreme Court should consist of a chief justice and two justices," but it was added, "any of

whom may hold the court." Under this provision it was decided that one justice could hold a court either at a *general* or *special* term. The phraseology of the constitution of 1846 differs from that of 1821. The 6th section declares that any three or more of the justices may hold the general terms; and that any one or more may hold special terms and circuits. One judge cannot now, as formerly, hold a general term of the court. But section 5 of the same title confers on the Legislature the same powers to alter and regulate the jurisdiction and "proceedings in law and equity," it possessed before. That power was very broad; under it circuit judges were authorized to hold courts to hear and decide cases and bills of exceptions, and on the decision a judgment might be entered in the cause. So, too, the 20th section of the act in relation to the judiciary (Laws of 1847, p. 325) expressly directs that "orders and decrees in suits and proceedings in equity may be made at special terms, and that all suits and proceedings in equity shall *first* be determined at a *special term*, unless the justice holding the special term shall direct the same to be heard at a general term." The power to hear a cause on the merits on pleadings and proofs, and to make a final decree in the same, is, by this section, expressly conferred on a single justice sitting at a special term. And this provision has been held constitutional by the Court of Appeals: *Gracie v. Freeland*, (1 Comstock, 228.) It was decided, in that cause, that it was the duty of the court sitting in general term, to entertain a rehearing of a cause, that had been heard by a single justice. If the provision for a rehearing by a single judge had been a violation of the constitution, then the decree would have been simply *void*, as having been made *coram non judice*, and would have been neither the subject of an appeal nor a rehearing; and it needs no argument to show that if a single judge can hear a cause on the merits and make a final decree therein, under the present constitution, he may grant a new trial, on the merits, where the verdict is against the evidence.

2d. The next question is, whether the power is conferred by the Code of Procedure? It may be admitted that this power is nowhere given in express terms; and that the decision of this question involves the construction of several provisions of that instrument, which are obscure and of difficult interpretation. Nevertheless, I am of the opinion that the power is necessarily implied, and that it may be shown with reasonable certainty. I have come to the following conclusions upon this point:

1. That no appeal from a judgment entered by direction of a single justice can now be brought for any *error of fact*. Appeals are now confined to *errors of law*, (section 348.) In that respect the code of 1849



differs from that of 1848. (See section 297 of the code of 1848.) Can it be supposed that the Legislature intended to deny all relief, where the jury, by overlooking some important fact, or by misunderstanding the evidence, or from any other cause had determined manifestly against evidence? Or where, from passion or prejudice, the damages were excessive. Or where, upon a point not litigated at the trial, the injustice of the verdict was placed beyond dispute by newly discovered evidence? This was an inherent and salutary part of the jurisdiction of the Supreme Court, which it cannot be supposed the Legislature intended to abolish.

2. These cases cannot be heard at a general term, except on appeal from the "order" of a single judge, with the single exception of a case agreed on, under section 372. It is the manifest policy of the code that the court sitting at the general term shall be an *appellate tribunal*. By the 278th section, it is declared "that judgment upon an issue of law or of fact, or on confession, or upon failure to answer, (except, &c.) shall, in the first instance, be entered upon the direction of a single judge or report of referees, subject to review at the general term." Though this section does not specify judgments on a case upon the evidence, yet the terms of the section embrace *all cases*; "judgment upon an issue of law or of fact," is an expression that was intended to include every case that can arise, in which judgment is rendered, after an issue has been framed upon an answer, either of law or fact. This is in accordance with the theory of giving two appeals in all cases originating in the Supreme Court, as set forth in the report of the commissioners under section 210. They say, "Issues of law and fact in *equity* cases have heretofore been tried before a single judge. Issues of fact, in common law cases, have heretofore been tried by a single judge; while issues of law have been tried before the judges. To produce uniformity, we propose that all issues be tried in the first instance before a single judge, whether of fact or law. By this arrangement we are enabled to *give two appeals* in cases originating in the Supreme Court; one from the special term, or circuit, to the general term, and one to the Court of Appeals." Thus, where questions of law are decided at the circuit, and exceptions taken, the decision at the circuit is the first decision, and from that there is an appeal to the general term; and from the decision at general term to the Court of Appeals. It can hardly be doubted, on a careful examination of this report, that all questions of law arising at the circuit, were intended to be heard on appeal, and appeal only. The original right to have these questions heard at the general term, without an appeal, however convenient that would be, is in hostility to the spirit of the code,

which provides that the remedy for any error in the law committed at circuit, must be sought by appeal, and on giving security. But,

3d. In trials before a single judge and jury, where there is no error of law complained of, there can be *no appeal*. Take the case of a special verdict under section 261, which simply finds the facts. Here, by section 278, the judgment must be entered before a single judge; in other words, the *special verdict* must be brought up at the special term, and argued and decided there, before the judgment is entered. Here is one case, therefore, where the hearing must be before the special term. The power, therefore, is impliedly given in this case to hear a cause on the merits at special term. But how is it with the other cases, where there may be a *general verdict*, but where the verdict is so plainly against evidence, or the damages are so enormously disproportioned to the cause of action that the judge, instead of directing a judgment, orders the case to be reserved for further consideration or argument under section 264? This section is a very obscure one, and various interpretations have been put upon it. It has been supposed by some that it was intended to embrace equity cases, where the judge wanted time to settle the provisions of a decree. A conclusive answer to this suggestion is found in the fact that those cases are not tried by a jury, (§ 254,) and therefore section 264 is not applicable to them. Another view of this section regarded it as embracing common law cases, where from the facts found by the jury, the judge hesitated what judgment to give, (Monell's Pr. 241.) But the advocates of this theory forget that on a *general verdict* there can be no hesitation; for the judgment follows the verdict unless the judge sets the verdict aside. Another construction of this section regarded it as giving a right to the judge to reserve the case for argument, to review his own decisions on a case or bill of exceptions at the special term. This is a more plausible construction than the others; but it is opposed to the theory of two appeals, before mentioned; and it involves the idea that for errors of the judge at circuit, a party may have his choice to go to the special term for redress at a comparatively small expense and without giving any security, or to go to the general term on an appeal by giving security to pay the debt. In the one case he virtually has the benefit of three appeals; from the judge at circuit to the special term, from the special term to the general term, and from the general term to the Court of Appeals. There is nowhere in the code any allusion to this practice. It is not found in section 257, which prescribes the order of business at the special term and circuit, nor is there any provision for the services in section 307, which prescribes the rate of compensation, for services in the several phases of a suit; and the

remedy by the appeal is provided in section 348 for precisely this class of cases, (viz.,) errors of law committed by the judge on trial. If the Legislature had intended to confer on the court at special term, this power of reviewing the errors of the judge at circuit, they would have said so in unequivocal terms. But it is nowhere even alluded to in the code.

But the case is very different with cases on special verdict, motions for new trial on the ground that the verdict is against evidence; and on the ground of excessive damages. In all these cases, the motion must be made at special term or nowhere. There is no provision for an appeal (except on the law) from a judgment entered by the direction of a single judge. We have seen that the case of special verdicts *must* go to the special term. Then why not in the other cases I have enumerated, where no error of law has been committed, and where there must be, otherwise, an absolute failure of justice? It seems to me that by a very strong implication, this power must be exercised by a single judge and at the special term.

4th. Again, in section 401, it is enacted that motions may be made in the first judicial district, to a judge or justice out of court, except for a new trial on the merits. A new trial for the reason that the verdict is against evidence, is a motion for a new trial on the merits; and by implication, that motion may be made at special term.

For these reasons I am of the opinion that a justice at special term has the power to hear and decide a motion for a new trial, on the ground that the verdict is against evidence.

NOTE.—As the reasoning of Mr. Justice GRIDLEY, upon the question involved in this case, will appear to be in opposition to that of *Pepper v. Goulding*, *ante*, page 310, it is proper that the circumstances attending the publication of the latter case should be stated. After that case was set up and *struck off* by the printer, a communication was received from Judge GRIDLEY, requesting that it should not be published, as he had come to a different conclusion upon some of the points involved in it, and wished it to be re-written before publication. Of course the answer to the request was, that it was then too late to save it from publication, it having been struck off. On receiving the above case, Judge G. remarked (in substance) that his attention was drawn to this subject more particularly, in writing this opinion. He considered that the case of *Leggett v. Motz*, *ante*, page 325, (which he had recently seen,) contained the most *harmonious system*. According to it, the decision of referees on questions of fact are to be brought before the special term; while questions of law go the general term by appeal. This is in harmony with cases before a jury. They are disposed of in the same way. Although much obscurity remained in relation to this question—as that section 348 of the code does *not* include appeals from referees' reports—and it was quite apparent that the commissioners did not provide for cases where the jury erred, there being no express provision, giving that business to the special term, &c. &c. Yet, on the whole, he thought the views taken by Mr. Justice SANDFORD would conduce to more harmony in practice in that class of cases.

## SUPREME COURT.

BENJAMIN CAHOON, FRIEND COOK and POWERS L. GREENE, agt.  
THE PRESIDENT, DIRECTORS AND Co. of the Bank of Utica.

A claim for money had and received cannot be joined in a complaint with a claim founded on a refusal to deliver up promissory notes, alleged to have been paid and satisfied. The latter has always been treated as a tort, (3 J. R. 452.)

*Herkimer Special Term, April, 1850.*—The plaintiffs are the general assignees of Samuel W. Brown (now deceased.) This action is brought under the following circumstances. Brown, in his lifetime, procured to be discounted by the Bank of Utica three notes, amounting in the aggregate to three thousand dollars; two of which were made by himself, and one was made by Brown and Rossiter. At the time of getting the notes discounted, he placed in the hands of the bank as collateral security, a bond and mortgage made by S. Churchill, on which was due something over \$3000. The notes were not paid at maturity; but, afterwards, the bond and mortgage were paid up, satisfying the notes and leaving a surplus in the hands of the bank of \$89.42. This sum has been demanded by the plaintiffs; and also the notes, on the allegation that Brown's property having paid the note of Brown and Rossiter, his assignees are entitled to the possession of it, as evidence against Rossiter. The complaint sets out the above facts, and demands judgment for the \$89.42; and that the notes be delivered up to the plaintiffs. To this complaint the defendant has demurred for misjoinder of actions.

WARD HUNT, *for the demurrer.*

A. LOOMIS, *contra.*

GRIDLEY, Justice.—It is manifest that this is the union of a demand for money had and received, with a claim which, under the former practice, would have been the foundation of a bill in chancery to compel the delivery of the notes, under the powers by which that court directed the delivery of deeds and other writings, (see Jeremy's Equity Jurisdiction, 468.) The facts on which the pleader relies to show that the plaintiffs are entitled to both kinds of relief, are set forth in the complaint; and both kinds of relief are distinctly demanded, in the prayer of the complaint. Now, if this be so, these causes of action require different trials. The money demand is triable by a jury, and the claim in equity is triable by the court, (sections of the Code, 253, 254.) In the one case, the verdict would be for the sum demanded, \$89.42; in the other, upon the facts of the case, the judgment of the court would be, granting the plaintiffs to

be right in the law, that the notes be delivered up; a verdict, it is at once seen, is inappropriate, unless it be a special verdict, on which, when found, the court pronounces judgment.

It is true that by section 253 it is provided; that "when in an action for money only, or for *specific real or personal property*, there shall be an issue of fact, it shall be tried by a jury." Now this section relates to personal property which was formerly the subject of an action of replevin, and does not relate to claims in equity; several provisions seem incompatible with such a case; for example, the 5th subdivision of section 207. But,

2. Suppose that instead of being a claim in equity it is a proceeding to obtain the possession of personal property under chapter 2 of the 7th title of the code, sections 206 to 217 inclusive; then there should have been an affidavit of the facts, and very special pleadings should have been pursued, entirely incompatible with the union of this with a demand for money had and received. Again, the 167th section forbids the uniting of this with any other cause of action. This section embraces seven distinct classes of actions, providing that any of the same class may be united; of these the sixth is, "claims to recover personal property, with or without damages for the withholding thereof." "But the causes of action so united must all belong to one only of these classes," is the express injunction of the code at the close of this section.

3. But it is argued that these causes of action are authorized by the 1st and 7th subdivisions of this section. The 1st embraces causes of action arising out of contract, express or implied; that the claim for the money is sought under an implied promise, is quite clear; but a claim founded on a refusal to deliver up notes that are paid up, and "*functio officio*" has always been treated as a tort, (*Todd v. Crookshank*, 3 J. Rep. 452.) Again, there is no such contract set out. If the law would imply a contract to support such a claim, it would imply a contract in a case of assault and battery, to obey the laws of the land, and authorize damages for its breach.

The 7th subdivision embraces "claims against a trustee, by virtue of a contract or by operation of law." This section manifestly relates to claims in equity against a trustee, properly so called, and has no reference to a common law action for money had and received. We must have some regard, in construing the code, to the great landmarks of the law, as it existed before that instrument became a law. This would be stretching the doctrine of torts over every transaction of life. This could not have been the intention of the Legislature. Demurrer allowed.

## SUPREME COURT.

————— PECK vs. ERASMUS D. FOOT and wife.

A *return to a certiorari* made by a *judge*, who was out of office, before the service of the *certiorari* upon him, is a nullity.

Where a judge of the late Common Pleas was served with a *certiorari*, after his term of office had expired, under the amended constitution of 1846, to remove certain proceedings had before him, (while in office,) relating to "summary proceedings to recover the possession of lands," *held*, that the return made by him was a nullity.

A *justice of the peace* is authorized by statute, (2 R. S. 271, § 260,) to make a valid return to a *certiorari* served upon him, *after he has gone out of office*, for the purpose of reviewing a *judgment* rendered by him. But there is no such provisions of law in cases of special proceedings, made applicable to a judge.

————— *Special Term*, ———, 1850.—Motion to set aside a return to a *certiorari*. Proceedings were instituted in June, 1847, by Foote and wife, against Peck, before Grosvenor S. Adams, then one of the judges of the Greene Common Pleas, to recover the possession of land, under the statute relating to summary proceedings, on the ground that the term of the tenant had expired, and also that he held over after default in the payment of rent. In September following, the term of office of the judge before whom the proceedings were had, having expired on the first Monday of July, by the operation of the new constitution, a *certiorari* was granted by this court, at a special term, under the provisions of the 47th section of the act relating to summary proceedings for the recovery of the possession of land, (2 R. S. 516.) Subsequently, and after Judge Adams had removed from the county of Greene, he made and filed a return to the *certiorari*. A motion was made by Foote and wife to set aside the return to the *certiorari*, on the ground that Adams' term of office had expired, and that he had removed from the county, and for general relief.

L. TREMAIN, *for Foote and wife*.

A. MARKS, *for Peck*.

HARRIS, Justice.—Though it is the first with which I have met, I think we have here a case, which, on its passage from the old to the new judicial system, has fallen through. The writ of *certiorari* lies to remove all judicial proceedings in which no writ of error can be brought. It may be addressed to any officer, or tribunal, exercising judicial authority. It does not lie to any person who does not claim such authority. In respect to the judgment of a justice of the peace, it is provided

by law that a *certiorari*, duly brought and served upon the justice, after he shall have gone out of office, shall have the same effect as if served whilst he was in office, (2 R. S. 271, § 260.) And if the justice be dead, insane, or out of the state, the case may be reviewed upon affidavits, with the same effect as if the facts had been returned by the justice, (2 R. S. 272, § 262.) These provisions were deemed necessary by the Legislature, in order to save to parties the right to review justice's judgments after the justice has gone out of office. But though the Legislature has authorized this court to award a *certiorari*, for the purpose of examining any adjudication made under the statute relating to summary proceedings to recover the possession of land, it has not provided, as in the case of justices' judgments, for obtaining a return to the *certiorari*, or giving effect to such return, when the officer whose proceedings are to be reviewed, has, before he is served with the *certiorari*, gone out of office. There is no statute, nor do I know of any principle of law, which authorized the person before whom these proceedings were had, to make a return to the *certiorari*, or which would give any effect to such return, when made. To be effectual, the return must be an official act, performed under the sanction of an official oath. Here the return has been made by a mere private citizen, wholly divested of the official power and responsibility with which he had been clothed while in office. I cannot see how the return is to be regarded as anything else than a mere nullity.

By the 76th section of the Judiciary Act, provision is made for transferring certain proceedings, and, among others, proceedings "for the removal of a tenant or other person from lands," which should be *pending*, on the first Monday of July, 1847, before any officer whose term of office would expire on that day, to some other officer under the new constitution. If the proceedings in question, can be deemed to have been *pending* on the day mentioned, it may be that, by procuring the transfer of the proceedings as provided in the section referred to, the party may obtain a review. Whether that section can be made to embrace such a case, is a question which I need not now decide.

In the view I have taken of the case, the *certiorari* which has been allowed, can be of no advantage to the party obtaining it. I think it better, therefore, to direct that the rule allowing the *certiorari* and all subsequent proceedings be vacated. Neither party should have costs upon this motion.

## SUPREME COURT.

ZALMON J. MCMASTER et al. agt. ALFRED R. BOOTH, Agent of the Sing Sing State Prison.

An action based upon *carelessness* or *negligence* cannot be *referred* under the code, although it may become necessary in the course of the trial to examine into a large number of items constituting the plaintiff's claim for damages.

The code may have abolished the *forms* of actions, but the *principles* which govern them are retained. Actions of *tort* under the former system were never referrible; not because of the *form*, but of the *substance* of the action.

*Dutchess Special Term, August, 1850.—Motion for reference.* The complaint sets forth that the plaintiffs occupied one of the shops belonging to the Sing Sing Prison, carrying on the business of plane-making; that the agent of said prison caused to be put, into a wooden building adjoining, a steam engine and furnace, and machinery connected therewith; that a negro convict was employed to take charge of said engine-room and of the making the fires; and that by reason of the careless and negligent manner in which the fire in said furnace was kept, the building took fire on the 19th July, 1843, whereby the property in the shop occupied by plaintiffs was consumed or greatly injured. The property destroyed comprised several thousand planes and a great number of tools, &c. The plaintiffs, upon an affidavit that the trial of the cause will involve a long account, now move for a reference.

T. NELSON and S. F. REYNOLDS, *for plaintiffs.*

Mr. LOCKWOOD and Mr. LARKIN, *for defendant.*

BARCULO, Justice.—It is quite clear that, if the plaintiffs succeed in establishing the facts which constitute the defendant's liability on the ground of negligence, it will be necessary to inquire into a great number of items of damages, which may render the trial protracted and difficult to be disposed of by a jury. The reasons for a reference, therefore, on the score of convenience and economy of time, are of the most cogent character, and I should certainly grant this motion if it could be legally done.

But the question is, whether this is a *referrible* case?

Under the old order of things, when *actions* had *names*, this would have been denominated an action of *tort*; and the law was well settled, by repeated adjudications, that such actions could not be referred. (19 Wend. 21; 3 Denio, 380; 19 Wend. 108.)



But it is insisted that the code, which, by disturbing well settled rules, is put forward as the basis of all sorts of experimental motions, and has proved a most prolific source of litigation, has changed the law in this respect. But I am inclined to think this proposition untenable. Section 271 provides for a reference without the consent of parties, "when the trial of an issue shall require the examination of a long account." The account in this case is *long* enough, but is it such an *account* as is contemplated by the law? In the case of *Silmsær v. Redfield*, (19 Wend. 21,) Justice NELSON says that "the statute only applies to cases where accounts, in the common acceptance of that term, may exist and require examination."

In *Dedrick v. Richley*, (19 Wend. 108,) Justice BRONSON observes, "It has always been regarded as a proceeding applicable only to actions of assumpsit, or debt on simple contract, where the accounts and dealings of the parties are directly in issue." Now, although the *forms* of actions are abolished, the principles which govern them are retained. The objection which formerly lay against referring actions of tort was not founded on the *form* of the action, but on its substance. In cases of reference, it was supposed that the referees had little or nothing to do but examine the accounts and determine the balance due: but in actions of tort, the substance of the action was independent of, and in some degree preliminary to, the examination of any items of damage which might be put into the shape of an account. In the case before us, the action is based upon the *negligence* or *carelessness* of the defendant, which is a question emphatically for a jury.

Again, to pursue the rule of Judge NELSON, this is not an account within "the common acceptance of that term." As I understand the meaning of that term, I should define an account to be a *computation or statement of debts and credits arising out of personal property bought or sold, services rendered, material furnished, and the use of property hired and returned*. If an account does not fall within this definition, it is not an account within the ordinary legal acceptance of the term, and cannot be referred without the consent of the parties.

It is obvious that the commissioners did not intend to alter the prevailing rule on this subject by enlarging the meaning of the words "long accounts." For it will be seen upon page 177 of their first report that they had in view the constitutional provision which preserves "trial by jury in all cases in which it has been heretofore used," inviolate forever. And on page 185 they say, "a trial by jury is secured by the constitution to the parties, if they require it, where there are issues of fact in the courts

of law, excepting only those where the trial involves the examination of a long account." They here refer to the constitution and the law as it existed prior to the code. If, therefore, actions of this nature were not referrible under the former law, and the constitution has rendered inviolate the right of trial by jury in all cases in which it has been heretofore used; it follows that the code has not, and could not, deprive either of the parties, in the case before us, of the right to have the issue in question tried by a jury. The motion must be denied, but without costs.

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### SUPREME COURT.

WILLIAM R. DOTY agt. ROSWELL S. BROWN. .

Where the Court of Appeals dismissed an appeal with costs, and remitted the proceedings to the Supreme Court to be proceeded upon, &c. And, on motion in the latter court for judgment upon the remittitur, it was objected that the former court never acquired any jurisdiction over the cause, consequently had no authority to dismiss the appeal, and award the general costs on the appeal. *Held*, that of the former court acted without authority, its judgment and proceedings were *void*, and formed no bar to a remedy brought in opposition to them. That the jurisdiction of any court exercising authority over a subject may be enquired into in every other court where the proceedings of the former are relied on, and brought before the latter, by a party claiming the benefit of such judgment or proceedings, (see authorities cited in the case.) The jurisdiction of a court of general jurisdiction is to be presumed, while that of an inferior and limited jurisdiction must be shown. (The decision of the Court of Appeals, on the dismissal, was concurred in.)

Costs in suits pending on the 1st day of July, 1848, except costs of motions therein, on final determination in the Court of Appeals, must be taxed under the fee bill and statute, regulating costs in the Court for the Correction of Errors. The code has no application to the costs in such suits, except costs upon motions.

*Chenango Special Term, June, 1850.*—In this case the plaintiff appealed to the Court of Appeals from the judgment of this court and perfected his appeal. But the bill of exceptions was alone returned by the clerk to the Court of Appeals, without the record, and the respondent moved to dismiss the appeal for that reason; which motion was granted with \$10 costs, and also the costs of the appeal, and ordered a remittitur to this court: and it is claimed that no remittitur can be granted under the 12th section of the code in such a case; and the respondent now moves for judgment at special term, and the same is opposed.

D. GRAY, *for appellant.*

R. BALCOM, *for defendant.*

MASON, Justice.—This case comes before the court on motion for judgment upon a remittitur from the Court of Appeals to this Court. The Court of Appeals dismissed the appeal from this court with the costs of appeal and ten dollars costs of motion, and have sent the remittitur to this court to be proceeded upon according to law. The defendant's counsel claim and insist that the Court of Appeals never acquired any jurisdiction over the subject-matter of the cause, and consequently had no jurisdiction to dismiss the appeal, and award the general costs on the appeal. The plaintiff's counsel, on the contrary, contends that the judgment of the Court of Appeals, as contained in their remittitur is conclusive between the parties, so far as this court is concerned. I am not prepared to assent to the proposition contended for by the defendant's counsel. When a court has jurisdiction it has a right to decide any question which may arise in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not merely voidable, but absolutely void, and form no bar to a remedy sought in opposition to them. And the jurisdiction of any court exercising authority over a subject may be inquired into in every other court where the proceedings of the former are relied on, and brought before the latter by a party claiming the benefit of such judgment or proceedings, *Elliott et al. v. Pursell et al.*, 1 Peters' U. S. R., 328; *Wilcox v. Jackson*, 13 id. 511; 2 Howard U. S. R. 43; 3 id. 750, 762, 763; *Borden v. Fitch*, 15 J. R. 141; *Mills v. Martin*, 19 J. R. 33; *Sutton v. Edgerton*, 9 Cow. R. 227; *Adkins v. Browner*, 3 Cow. R. 206; 1 Hill R. 130; 5 id. 285.)

The rule is a familiar one that as to courts of general jurisdiction, like the Court of Appeals in this state, its jurisdiction is to be presumed while that of courts of inferior and limited jurisdiction must be shown by the party claiming under them, as their authority will not be presumed for their judgments, (see cases above cited.) I have, therefore, looked into the papers before me on this motion to ascertain whether they overcome the presumption of jurisdiction which the law attaches to all judgments in that court, and I have not been able to discover that the papers show a want of jurisdiction in this case. The judgment of the Supreme Court was perfected and was a final judgment from which an appeal would lie under section 11 of the code; and there is no question made but that the appellant had complied with section 334, so as to render the appeal effectual.

The return of the clerk of Chenango county to the Court of Appeals

shows that there is a record as well as bill of exceptions while the clerk returns only the bill of exceptions with the order of September 4th, 1849, omitting the record of judgment. By the third rule of the Court of Appeals, if the clerk's return be defective, either party may, on an affidavit specifying the defect, apply to one of the judges of that court for an order that the clerk make a further return without delay. This might have been done for aught appears in the papers before me. If I go out of the papers and consider the fact which I am in possession of from another motion which was before me in this cause at the same term, to-wit, that the bill of exceptions, although filed, was not inserted in the record, then I do not think it presents a case where the appellate court is without jurisdiction. I know that rule 2d of the Court of Appeals, provides that the appellant shall cause the proper return to be made and filed within twenty days, and says if he omit to do so he shall be deemed to have waived the appeal. But even this rule does not take away jurisdiction of the appellate court, unless the party has actually proceeded under it and entered the order dismissing the appeal, which was not done when the motion was made before that court to dismiss the appeal; and the notice which Mr. Gray, the attorney for the appellant, served upon Mr. Balcom, was a mere nullity (*Bennett v. Harkness* 4 How. Pr. Rep. 158,) and cannot be regarded as a discontinuance of the appeal. And I have not been able to learn from the papers before me on this motion that the court of appeals dismissed the appeal for the reason that they had no jurisdiction of the appeal. I infer, on the contrary, that the appeal was dismissed because of a defect in the clerk's return in omitting to send the record with the bill of exceptions. It cannot be said that the court have no jurisdiction because the clerk has made a defective return. The appeal in this case was perfect on service of the notice of appeal and executing the undertaking provided by section 334 of the code; and if the appellant had procured an order of the court below within twenty days to annex to the bill of exceptions the judgment-roll and had the clerk returned the record also, the appeal would not have been dismissed.

But it is said by the plaintiff's attorney, that section 12 of the code does not authorize the Court of Appeals to send a remittitur to this court when that court dismisses the appeal. The determination of this question depends upon the construction which is given to that section, and the Court of Appeals have held in two cases at the January term, 1850, that it does, and hence adjudged the very question in the case under consideration, and which it ill becomes this court to review, (4 How. Pr.

R. 184.) The motion in this case must therefore be granted, and the defendant must have judgment for the costs of the appeal and ten dollars costs of motion to dismiss the appeal.

And as a question was raised on the motion as to what costs the respondent was entitled to, I may as well settle that question now and save another motion in this cause. The costs are governed by the fee bill as contained in the Revised Statutes and are to be taxed by an officer authorized to tax costs in such cases.

By section 8 of the code, none of the sections of title 10 of the code, "*entitled of the costs in civil actions*," are applicable to civil actions commenced in the courts of this state before the 1st day of July 1848, unless otherwise provided therein.

Now the only provision in relation to applying any part of title 10 to suits pending on the 1st day of July 1848, is found in the act entitled "an act to amend an act entitled an act to facilitate the determination of existing suits in the courts of this state," passed April 11, 1849, and which applies section 315 alone, and which is the section in relation to costs on motion, &c. It follows, therefore that the code, so far as costs are concerned, except as to costs upon motion, has no application to any suit pending in the courts of this state on the 1st day of July, 1848. And all such suits are left to their final determination, into whatever court they may be carried, to the effect of the former fee bill. The costs of the appeal in this case are to be taxed under the fee bill regulating costs in the Court for the Correction of Errors, as provided by the rules and practice of that court and the statutes in relation thereto, (2 W. R. 239; Graham's Pr. 977, 978, 2 ed.; 2 R. S. 622.)

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## SUPREME COURT.

### ELIZABETH M. BEDELL vs. JOHN W. STICKLES.

An order of a single justice refusing to strike out matter as irrelevant and redundant, in a pleading is not an appealable order to the general term, (See *Whitney* agt. *Whitney* *ante*, page 315.)

Appealable orders, as settled in the second district are, 1st. Those mentioned in § 349. and which relate only to appeals from orders and judgments in "civil actions."

2d. Special proceedings of an equitable nature, such as under the former practice were appealable from a vice-chancellor to the chancellor.

3d. In special proceedings, not of an equitable nature, where an appeal is expressly given by statute, or existed according to the former practice of the Supreme Court.

Special proceedings are not regulated by § 349, but depend upon the pre-existing laws and practice.

*It seems, that the rule in relation to striking out irrelevant and redundant matter, should be in analogy to that of the old Supreme Court, in relation to frivolous demurrers. Where there is some question, or ground for argument about it, the application should be refused. (The views of Mr. Justice HARRIS in the cases of White v. Kidd, and Hynds v. Griswold, ante, pages 68 and 69, upon this subject, concurred in.)*

*Dutchess General Term, Poughkeepsie, July, 1850.*—Justices MORSE, BARCULO and BROWN. In this case Justice WRIGHT made an order on the application of the defendant, refusing to strike out certain matters contained in the complaint, which defendant's counsel moved to strike out as redundant and irrelevant. The defendant, thereupon, appeals from that decision to the general term, and contends that this court should now strike out those facts which the justice refused to strike out.

E. P. COWLES, *for plaintiff.*

Mr. REYNOLDS, *for defendant.*

By the Court, BARCULO, Justice.—The question as to what cases are appealable from the decision of a single justice, was presented several times at the last general term of this court held at Brooklyn. We therefore took the matter into consideration, with a view of settling the practice in this district; and now take this occasion to state our conclusions.

In the first place, we are of opinion that section 349 of the code relates only to appeals from "orders and judgments in *civil actions*." This is apparent as well from the language of the section as the language of section 323, which is the first section of the title, and declares that "the only mode of reviewing a judgment or order, in a *civil action*, shall be that prescribed by this title;" and section 8, which assigns the second part of the code "to *civil actions* commenced in the courts of this state," &c.

It follows from this view, that appeals in *special proceedings* are not regulated by section 349, but depend upon the pre-existing laws and practice.

Consequently, where the proceeding is of an equitable nature, such as under the former practice, would have come within the cognizance of a vice-chancellor, and was subject to appeal to the chancellor, in such cases an appeal now lies from the decision of a single justice to this court at a general term. This, of course, includes the applications in regard to the removal of trustees, or the disposition of trust estates which have been before us.

But where the special proceeding is of such a nature as not to fall within the jurisdiction of the former Court of Chancery, then, as a *general rule*, no appeal lies to the general term, from the decision of the

special term. The exceptions are where such appeal may be expressly given by statute or existed according to the former practice of the Supreme Court. This rule is analogous to the rule formerly prevailing in the Court of Chancery and Supreme Court, the powers of which are transferred to this court by the constitution and Judiciary Act of 1847.

Applying these principles to the case before us, it is obvious that the appeal cannot be sustained, because it is from an order made in an *action*, and therefore, is regulated by the code, but does not fall within any of the subdivisions of section 349. The defendant's counsel contends that it "involves the *merits of the action*, or some part thereof." But this cannot be so; for the very ground of the motion is, that the matter sought to be stricken out is *redundant and immaterial*. Now, if the matter is redundant and immaterial, it cannot clearly involve the *merits*; and if it does not involve the merits it cannot get to us by appeal. If, however, it should be conceded that the matter does involve the *merits*, then the decision of Justice WRIGHT in refusing to strike out the merits, was clearly right, and must be affirmed, if we should entertain the appeal.

In regard to the question of striking out irrelevant and redundant matters, I will add that I have had several recent applications before me of this nature, and have in every case denied the motion. This was done upon the ground that there was *some question* as to the matters being wholly irrelevant. I think the true rule to be adopted, is one in analogy to the rule of the former Supreme Court, in regard to frivolous demurrers. If the case was such as to require any *argument* to show that it was frivolous, the court would not dismiss the case, but retain it for argument in its order on the calendar. So under the code, if the matter on being stated is not clearly irrelevant, it should not be stricken out on motion, but the party should be left to his demurrer. Nor should motions of this character be encouraged by striking out every superfluous word unless it partakes of the scandalous, or otherwise manifestly aggrieves the opposite party. I think that the true view of this part of the code has been taken by Justice HARRIS in *White v. Kidd*, and *Hynds v. Griswold*, (4 How. 68 and 69.)

## SUPREME COURT.

GRAHAM agt. MILLIMAN.

Where a case has been tried without a jury, or by a referee, a review upon the evidence appearing upon the trial, either of the questions of *fact* or of *law*, can be heard before a special term; such terms having power to grant or refuse a new trial.

Such review is brought before the court by a case made and settled according to the rules of the court.

A bill of exceptions taken on the trial, or in pursuance of § 268 and 272 of the code, is parcel of the record, and can be heard only on appeal at a general term.

A case reserved under § 264, 265, can be heard only at special term, either upon the judges' notes or upon a case as he shall direct.

A rehearing is a proceeding different from a bill of exceptions, case reserved, or motion for a review, and is to be understood in the sense in which the term was used prior to the code.

What costs are recoverable on the case reserved, motion for review, or rehearing? *Quare.* (This case accords with the views taken in *Leggett agt. Mott*, ante, page 325; and *Lusk agt. Lusk*, ante, page 418.)

*At chambers, July 22, 1850.*

WILLARD, Justice.—This is an application for an order to stay proceedings, on a judgment upon the report of referees, with a view to move at the next special term in Washington county, for a rehearing or new trial, in pursuance of section 272 of the code. It involves the question, whether the court at a special term, can grant a rehearing, or a new trial on a case, after a trial and judgment by referees?

The code provides four ways by which, in actions pending in the Supreme Court, the decision of the tribunal by which they are first tried may be examined. *First, by appeal.* This enables the court, at a general term, by means of a bill of exceptions, to correct the errors in matters of law, committed by a single judge, either at the circuit, or on a trial without a jury, or by a referee to whom the whole issue has been referred. (Code, § 348, 268, 272.) This appeal is a substitute for a writ of error, in actions at law under the former practice, and takes the place of the former appeals in the Court of Chancery, from first decrees. The rules which regulate the practice are 18, 19, 27, 32, and perhaps some others. This remedy cannot be pursued until *after* judgment, and reaches substantial defects of the record. *Secondly, by case reserved for argument, or further consideration, under sections 264, 265.* This applies to causes tried by jury, and must be moved for *before* judgment. The judge who reserves the cause, if he be the one who hears the argument, by necessary implication has the power to set aside the verdict and grant a new trial.



The last paragraph of rule 31 was designed to regulate the practice in this respect; and although the code and the rule are both silent on the subject, it is believed that a case, thus reserved, may be heard before any other judge holding a special term, with the like power of granting or refusing a new trial. If made at the same term of the trial, before the judge by whom the cause was tried, the argument will generally be made upon the judge's notes. But should there be an appeal to the general term, from the judge's order in granting or refusing a new trial, a case must be prepared according to the rule. *Thirdly, by a motion for a review upon the evidence appearing on trial, either of the questions of fact or of law*, on a trial by the court, where a trial by jury has been waived, and on trial by referees. (Code, § 268, 272.) The 15th and 24th rules, as originally drawn, were designed to regulate this practice. This motion is not made until after judgment. And *fourthly, by a rehearing granted by the court*, in which the judgment is entered, under the last clause of § 272. This applies only to cases in which the whole issue has been determined, on a trial by referees. The rules of the Supreme Court make no specific provision for this last class of cases, but they are left to be regulated by the code, and the general analogies of the practice. The 92d rule adopting the customary practice, in cases not provided for, is applicable.

The power of setting aside a verdict obtained irregularly, or by surprise, and of granting a new trial, on the ground of newly discovered evidence, belongs also to the special term, but these remedies are not material to be noticed in this connection.

The question whether a motion for a "review upon the evidence appearing on the trial, either of the questions of law or of fact," can be heard at a special term, was discussed at the convention of the judges who revised the rules in August, 1849. Some of the judges were of opinion that this is a different proceeding from a bill of exceptions, provided for in the first clause of the same section, 268, and was to be heard at a special term, whether the cause sought to be reviewed had been tried before the court, without a jury, or by referees. This was my own opinion. The 24th rule, as reported, did not prescribe before what court the question should be argued, it being supposed by me that the code contemplated that it should be had at the special term; a majority thought otherwise; and the clause requiring such case to be heard only on appeal at a general term, was adopted and inserted in the rule. If this clause be in conflict with the code, as I think it is, it must of course give way.

Some of these questions have recently been decided in the Superior

Court and Court of Common Pleas of New York, substantially in conformity to the views of the minority of the judges, at the last general meeting. The case of *Leggett v. Mott* (4 Howard, 325,) in the Superior Court, and *Harting v. McKinley* (3 vol. Code Reporter, 10,) in the New York Common Pleas, are in the main a correct exposition of the practice. I cannot concur with brother GRIDLEY, in *Pepper agt. Goulding*, (4 Howard, 310.) where he differs from the foregoing views of the law. His observations on the questions above considered, though entitled to great weight, were not necessary to a decision of the cause before him, inasmuch as the defendant had appealed; and he clearly could not be entitled to an appeal to the general term, and prosecute, at the same time, a motion for a new trial at a special term, or apply for a re-hearing. By bringing an appeal he had made his election of remedies.

The clause which allows a party to apply for a re-hearing, in a cause tried before referees, (§ 272,) was not in the original report of the commissioners on practice and pleading, nor was it in the code of 1848. It was an addition made to the section by the judiciary committee of the senate when the amended code of 1849 was adopted. In effect it gave one more remedy to correct the errors of referees, than it did to correct those of the court, when trying the cause without jury. The Legislature, we must presume, meant something different by the term *re-hearing*, from a *review upon the evidence*. Having used a technical term of well-known signification, without any intimation that a different meaning was intended to be affixed to it, the inference is that it should retain its technical meaning. It was probably intended to apply only to that class of cases which were formerly of equitable cognizance. Such actions are now generally tried without a jury by the court, or are referred to a sole referee to hear and determine. The re-hearing of a cause in chancery was a practice well-known to the profession. The Legislature may, perhaps, have been willing to retain it, as a cumulative remedy, when the action was tried by a referee; and as the distinction between actions at law and suits in equity was expressly abolished by § 69, the remedy thus retained, became applicable to all actions tried by referees, whatever the subject of controversy. It will never be necessary to apply for a re-hearing, except in cases where that would have been the appropriate remedy under the former practice. In most cases, the bill of exceptions will enable the complaining party to correct, on appeal, the errors of law, and a case will enable him to review, before a special term, subject to appeal to the general term, the questions either of fact or law, which may have arisen on the trial.

That a re-hearing should be applied for at a special term, rather than at a general term, is most consistent with the whole structure and plan of the code. It is the special term by which the referee is appointed. That term has power to render judgments and grant new trials. No judgment is entered at a general term, except on appeal. The judges at their general convention might, no doubt, by general rules, have imposed terms on granting a re-hearing and limited the time within which it might be granted. But they declined altogether making any new rules on the subject. As the 92d rule was intended to apply the customary practice of the former Court of Chancery and Supreme Court in cases not provided for by statute, or the written rules of the court, and as neither the code or the rules make any specific provision for the practice on moving for a rehearing, the special term will doubtless be governed, in acting upon these applications, by the former practice as indicated by the late rules in equity, number 78, 79 and 80, as far as they are not inconsistent with the present practice.

If the construction of the code, in the foregoing particulars, be correct, one consequence will be the increase of business at the special term. A party dissatisfied with the result of a trial will ask for a review, or a re-hearing, as the case may be; and as either of these remedies may be sought without giving security, they will generally be resorted to before an appeal. The conclusive answer to this objection is, that the fault, if it be a fault, is in the system and not in the courts. But in truth it does not essentially differ from the former practice. A motion for a new trial upon a case, could in most actions be made before the circuit judge, without giving bail. Such motion was made without bail, to set aside the report of referees, or the verdict of a jury, or a non-suit when the motion was made, in the first instance, in the Supreme Court. The judges may diminish the abuse by withholding an order to stay proceedings, when there is no probable cause for disturbing the decision below. The business of the general term will probably be diminished nearly in the same proportion as that of the special terms are increased.

Another correction of the abuse will be found in the fact, that to a great extent a motion for a review or re-hearing, and on a case reserved, must be at the expense of the moving party, without a prospect of reimbursement from the adverse party. The fee bill makes no specific allowance for drawing cases, engrossing same, &c., nor for the argument before the special term. Such argument cannot be treated as a trial of an issue, so as to entitle counsel to the fee allowed by § 307. The definition of the terms issue and trial (§ 248, 252) precludes such construc-

tion. A sum not exceeding ten dollars, may perhaps be allowed under § 315. The application for a new trial before a special term, is a motion, (§ 400, 401,) and perhaps in difficult or extraordinary cases, the prevailing party may be compensated by an extra allowance under § 308. It is obvious that the Legislature have held out no temptation to abuse on the score of costs, unless the fact of being relieved from the hazard of paying costs on failure, shall prove to be such temptation.

As there is probable cause for staying proceedings in this cause to enable the party to move, at special term, for a rehearing, or new trial, I shall grant the order.

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## SUPREME COURT.

ROBERT WATTS and others agt. JONATHAN AIKIN and others.

An appeal from a *surrogate's* order, admitting or refusing to admit a will to probate, should, in the *first instance*, be heard at *general term*.

*Dutchess General Term, Poughkeepsie, July, 1850.—Justices MORSE, BARCULO, and BROWN.*

T. C. CAMPBELL and H. ANGEVINE, *for appellants.*

H. SWIFT and B. BAILEY, *for respondents.*

By the Court, BARCULO, Justice.—The question is presented by this case whether an appeal from the surrogate's order, admitting a will to probate can be heard, in the first instance, at the general term.

Under the Revised Statutes such appeals were made to and heard by a circuit judge. By the 16th section of Judiciary Act of 1847, it is declared that the *Justices* of the Supreme Court shall possess the powers and exercise the jurisdiction now possessed and exercised by the justices of the present Supreme Court, chancellor, vice-chancellors, and *circuit judges*," &c. This section transfers the former powers of the circuit judges to the *Justices* of the Supreme Court and not the court itself. Under this provision alone, therefore, such appeals could not be brought to this court.

But the 17th section contains this clause: "appeals may be brought from the decisions, decrees or orders of the county judge, acting as surrogate, or other officer, acting as such, in all cases where appeals may now be brought from surrogates to the chancellor or circuit judge;" and

by a subsequent clause it is provided "that the appeals hereby authorized shall be brought to the Supreme Court organized by this act."

The question then arises whether the phrase, "other officers," includes the surrogate, so as to make appeals from his decisions, admitting or refusing to admit, a will to probate, appealable to this court. My first impression was that the term, other officers, referred solely to the district attorney, or local officers elected to perform the duties of county judge and surrogate. But subsequent examination has satisfied me that my impression was incorrect; for the Judiciary Act of 1847, speaks constantly of the "officers elected to perform the duties of surrogate," and nowhere speaks of the surrogate in any other way. In fact this phrase is substituted for the old title of "surrogate." Thus, in section 33, it is provided that "in counties, in which the duties of surrogate are performed by a separate officer elected to perform the duties of surrogate," &c. This clearly refers to *the surrogate*.

Again, section 37 declares "the county judge, or *other officer*, elected to perform the duties of the office of surrogate," &c., "when acting as surrogate," &c., shall possess the same powers, &c., as are now possessed by surrogates, &c. Similar language is also used in the "act to provide for the election of certain judicial and other officers, and to fix their term of office," *passed, May 12, 1847*; and it may not be unimportant to notice that section 14 declares that separate officers, elected to perform the duties of surrogate, under the 14th section of article 6 of the constitution, shall be denominated "surrogate of their respective counties." The section of the constitution above referred to, probably originates the phrase, by providing that "in counties having a population exceeding forty thousand, the Legislature may provide for the election (not of a *surrogate*, but) of a separate officer to perform the duties of the office of surrogate."

I think, therefore, that the term *other officer*, in section 17 of the Judiciary Act, includes the officer usually denominated "surrogate;" and that, therefore, an appeal lies from the decision of the surrogate of Dutchess county to this court. And if this be so, it is quite obvious that such appeal can and ought to be heard at the general term. For the appeal being given to the Supreme Court, *organized by that act*; and that act, in defining the duties of the special terms of the court, not including this nor any other appeal, it follows that such appeals can be heard only at a *general term*.

## SUPREME COURT.

MALISSA M'LEES agt. WILLIAM L. AVERY.

A defendant against whom a judgment is obtained for a less amount than he offered in writing, to allow judgment to be taken against him, under section 385, is entitled to costs against the plaintiff, from the time of the offer.

Such defendants is not entitled to an extra allowance, under sections 308, 309.

——— *Special Term, May, 1850.*—This action was commenced by summons and complaint, in January, 1849. It was brought to recover of the defendant money collected by him, as attorney for the plaintiff. The plaintiff in her complaint, as amended, demanded judgment for \$255. The defendant, on the day of the service of the copy of the amended complaint, served upon the plaintiff's attorney, an offer in writing, under section 385 of the code, to allow judgment to be taken against him for \$125. The plaintiff declined the offer, and the cause was referred to a referee to hear the cause, and report upon the whole issue, and he found in favor of the plaintiff \$115. The defendant now moves for an extra allowance in his favor of ten per cent. on the sum claimed by the plaintiff. The motion is resisted on the ground that no extra allowance can be made in this case.

W. L. AVERY, *in person*

W. L. F. WARREN, *for plaintiff.*

WILLARD, Justice.—By the 385th section of the code, the defendant was entitled to costs of the suit against the plaintiff, which accrued subsequent to his offer. The plaintiff was entitled to costs up to the time when the offer was made. The question is, can an extra allowance be made to the defendant, under the circumstances of this case. An extra allowance cannot be made unless the party in whose favor it is claimed has recovered judgment in the cause. This is obvious from an attentive examination of § 309. The 1st subdivision is, that *if the plaintiff recover judgment*, the extra allowance shall be upon the amount of money, or the value of the property recovered, or claimed or attached, &c. 2d. *If the defendant recover judgment*, it shall be upon the amount of money, or the value of the property claimed by the plaintiff, &c., &c. The defendant did not recover judgment in this cause, but the judgment went against him. He does not fall within the scope of the section and is entitled only to the costs which accrued subsequent to the offer. These costs are to be collected by motion, and probably may, on a proper applica-

cation, be set off against the plaintiff's judgment. The term costs embraces merely the ordinary costs of the suit, and not the extra allowance spoken of in sections 308 and 309. I think the defendant is not entitled to an extra allowance in this case.

Motion denied.

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### COURT OF APPEALS.

*Decisions—June Term, 1848—at the Court Room in the city of Rochester.*

EDMUND R. SHERMAN, plaintiff in error, vs. THE MAYOR, &c., of the city of New York, defendants in error.—*Judgment affirmed.* SAMUEL SHERWOOD, for plaintiff in error; WILLIS HALL, for defendants in error.

This was a question, whether under a written contract to pay seven cents per cubic yard for executing the digging and refilling, the lowest price for excavating common earth, the contractor who executed the work, could charge more than the contract price, where it appeared that a portion of the digging was through hard-pan and rock, and worth much more per cubic yard. *Held*, that the contract price must govern. (Reported, 1 Comstock, 316.)

ROBERT L. TAYLOR, plaintiff in error, vs. ANDREW C. MORRIS, defendant in error.—*Judgment reversed, and venire de novo by the Supreme Court; costs to abide the event.* F. R. SHERMAN, for plaintiff in error; JAMES J. RING, for defendant in error.

This was an action of ejectment. The title of the premises claimed under a will, brought in question the matter in dispute; that is, whether one executor can execute discretionary (with the executors,) as well as peremptory powers of sale, contained in a will; there being three executors appointed, and two of them neglecting to qualify. *Held*, that he could. (Reported, 1 Comstock, 341.)

ANDREW WINTER, plaintiff in error, vs. RANDOLPH Y. KINNEY, defendant in error.—*Judgment reversed, and venire de novo by the Supreme Court; costs to abide the event.* G. R. J. BOWDOIN, for plaintiff in error; WILLIAM CURTIS NOYES, for defendant in error.

This was a case deciding that any agreement taken from a party in custody, intended as an indemnity to the sheriff, for a breach of duty, is void. But the prohibition extends only to the officer—not to the plaintiff in the process. And where there is some evidence that such an

agreement is made with the consent and for the benefit of the party, and with his authority; it is a question of fact for the jury whether the sheriff or party made the agreement. (Reported, 1 Comstock, 365.)

ELISHA RUCKMAN, plaintiff in error, vs. STAOZY PITCHER, defendant in error.—*Judgment reversed, and venire de novo by the Supreme Court; costs to abide the event.* JAMES T. BRADY, for plaintiff in error; N. B. BLUNT, for defendant in error. This case decided, 1st, that the losing party in an illegal bet or wager may recover back from the stakeholder the sum deposited, after paid over to the winner, by direction of the loser. 2d. Such an action may be maintained, without demand. 3d. A wager upon the result of a horse-race in Queens county (Long Island course,) is unlawful, notwithstanding the statute allowing races there; and, 4th. That the party who stakes a sum of money with others, on an illegal wager, may recover his amount of the fund, without joining the others in the action. (Reported, 1 Comstock, 392.)

DAVID SELDEN, appellant, vs. BENJAMIN W. ROGERS, respondent.—*Decree affirmed.* P. Y. CUTLER, for appellant; A. C. BRADLEY, for respondent.

This was a demurrer by Rogers, one of the defendants, to a bill in chancery, filed by Selden, to obtain a partition of certain lands held by Noyes & Ogden, under a conveyance in trust to sell the lands, or the equitable interest which Rogers had at the time of the conveyance to the trustees, and to apply the proceeds to the payment of certain debts which Rogers once owed to Selden & Vermilya, a part of which debts had been assigned to others of the defendants, when the bill was filed. And to restrain the trustees from selling the trust property for the benefit of the holders of those debts.

It appeared from the bill that the question was a very complicated one, arising from trust conveyances. And the demurrer involved two questions. 1st. Whether there was any equity in the case made by the bill. 2d. Whether Rogers was a necessary party.

The vice-chancellor of the first circuit overruled the demurrer, and Rogers appealed to the chancellor, who reversed the vice-chancellor's decision, saying, that "it was very evident from the statements in the bill, that the complainant had not such an interest in the property conveyed to the trustees, as entitled him to make a partition of it. By the terms and operation of the original trust deed, the only interest he had in the land was the right to have it, or so much of it as was necessary, sold for the payment of the debts due to him and Vermilya, when those debts should become due. That clearly was not a partible interest, which would authorize the filing of a bill in partition by him."



The chancellor also held that Rogers was not a necessary or proper party. (Not reported.)

ADAM W. SPIES, plaintiff in error, vs. ROBERT GILMORE and others, defendants in error.—*Judgment affirmed.* CHARLES O'CONOR, for plaintiff in error; A. CRIST, for defendants in error.

This was a case holding that a demand of the maker of a promissory note, specifying no place of payment, and notice to the endorser, was necessary to charge the endorser, where the maker and endorser resided out of the United States at the time of the making and maturing of the note, such residence being well known to the payee and holder.

Also, that an endorser of a note for the purpose of security, and enabling the maker to get further time of the payee, could not be held as joint maker or guarantor. (Reported, 1 Comstock, 321.)

CHARLES RICHARDS, plaintiff in error, vs. CHARLES M. GRAHAM, defendant in error.—*Judgment affirmed.* THOMAS L. WELLS, for plaintiff in error; T. E. TOMLINSON, for defendant in error.

This was an action of *assumpsit*: the plaintiff declared upon the money counts, and for goods, work and materials generally; and in his bill of particulars, served upon the defendant's attorney, he claimed, besides a small amount for extra work, the sum of \$180, as amount due to plaintiff as agreed upon for finishing three houses in Eleventh street, in the city of New York, for the defendant.

The defendant pleaded the general issue, payment and notice of set-off; to the pleas of payment the plaintiff replied and joined issue. The cause was tried in the Superior Court in New York, in 1842. The jury rendered a verdict for the plaintiff for \$70.06. There was a disputed point upon the trial, arising from the terms of the contract, upon which contradictory evidence was given; that was, whether the plaintiff was to receive some \$93 of rent due from one Downing (his brother-in-law) to the defendant, as part payment of the contract price, \$180, or whether he was to receive \$180 besides the rent. The judge allowed the plaintiff to give evidence of the value of the work done by him, although the evidence was objected to as irrelevant and improper, on the ground that the work was by special agreement to be done for \$180.

The Supreme Court (BEARDSLEY, Justice) held that the disputed question respecting the contract as to the allowance of rent was fairly put to the jury to ascertain how it was in that particular. They having disposed of it by their verdict, there was no ground of complaint in that respect. But held, that the evidence admitted to prove the value of the work done was erroneous, because the plaintiff was not seeking to recover

on a *quantum meruit* for work and labor done by him; for the cause proceeded upon and was tried on the assumption or virtual concession that some particular price had been agreed upon between the parties. For this reason the judgment of the Superior Court was reversed. (Not reported.)

ANN LOHMAN *alias* MADAME RESTELL, plaintiff in error, vs. THE PEOPLE, defendants in error.—*Judgment affirmed*. EDWARD SANDFORD, for plaintiff in error; JOHN McKEON, district attorney, for defendants in error.

It was decided in this case, that mere surplusage in an indictment did not vitiate. Facts alleged in an indictment which constitute a misdemeanor will be good for that offence, although additional facts which nearly (*intent* not averred) constitute felony are also alleged.

Questions of privilege to jurors and witnesses in criminal cases were also raised and decided. (Reported, 1 Comstock, 379.)

JOHN F. J. DERAISEMES, plaintiff in error, vs. THE MERCHANTS' MUTUAL INSURANCE Co., defendants in error.—*Judgment affirmed*. CHARLES O'CONOR, for plaintiff in error; DANIEL LORD, for defendants in error.

This case decided that premium notes taken for premiums in advance, by a mutual insurance company, in pursuance of its charter, were valid for the whole face thereof, although the premiums on insurances actually received by the maker, amounted to only a part of such note. The consideration in such notes may be upheld, &c. (Reported, 1 Comstock, 371.)

JOHN HUGHES and others, plaintiffs in error, vs. PHILIP HONE and another, receivers, &c. defendants in error.—*Judgment affirmed*. This cause was submitted upon printed arguments and points. GEO. WOOD, for plaintiffs in error; DANIEL LORD, for defendants in error.

It appears that this case was substantially like the last. The principle involved being the same, and the decision the same. (Not reported.)

JOHN BOGERT, plaintiff in error, vs. HARRISON W. MORSE, defendant in error.—*Judgment affirmed*. E. VAN BUREN, for plaintiff in error; B. W. FRANKLIN, for defendant in error.

It seems, that where one party receives money from another, and there is no explanation of the fact, the presumption is that it is received as payment and not as a loan. (Reported, 1 Comstock, 377.)

JUDIAH ELLSWORTH, appellant, vs. LEWIS B. THOMPSON, respondent.—*Decree affirmed*. Submitted upon printed arguments and points. JUDIAH ELLSWORTH, appellant, in person; E. H. ROSEKRANS for respondent.

This was a case giving a construction to the 80th section of the title

of the Revised Statutes relative to writs of error and appeals; applying it to appeals from orders or decrees of the Court of Chancery, whether made by the chancellor or vice-chancellor.

Also, that a defendant in a foreclosure suit is not entitled to have set-off against the mortgage debt, an unliquidated claim for damages upon an injunction bond given after suit commenced. (Reported, 1 Barb. Ch. R. 624.)

ANNA MARIA MERRIAM, appellant, vs. JACOB HARSEN and others, respondents.—*Decree affirmed.* GEORGE WOOD, for appellant; JAMES W. GERARD, for respondents.

This case involved questions as to the powers and privileges of a *feme covert* in relation to the conveyance of real estate by her to her husband, through the medium of a third person; and the validity of such conveyances, &c. (Reported, 2 Barb. Ch. R. 232.)

THE MAYOR, &c. of New York, plaintiffs in error, vs. HORACE BUTLER, defendant in error.—*Judgment affirmed.* WILLIS HALL, for plaintiffs in error; CHARLES O'CONOR, for defendant in error.

This suit was commenced in the Superior Court of New York, to recover (in an action of debt) a balance due on a building contract. The question in the case involved the construction of a clause in the contract relative to the appointment of appraisers, and an umpire in case of disagreement, respecting certain extra work; and also whether the award of the umpire exceeded the matters submitted to him; and whether oral evidence might be given to invalidate the award, by showing that the arbitrators exceeded their powers, though the submission and award were in writing and under seal. (Reported, 1 Hill, 489, in Supreme Court. Reported, 7 Hill, 329, in Court of Errors, reversing the decision of the Supreme Court. On appeal to Supreme Court from the second trial. Reported, 1 Barb. Sup. Court Rep. 325.) This decision was affirmed by this court.

MATTHEW BARRON, plaintiff in error, vs. THE PEOPLE, defendants in error.—*Judgment reversed, venire de novo, by New York Oyer and Terminer.* EDWARD SANDFORD, for plaintiff in error; JOHN M'KEON, for defendants in error.

The deposition of a witness taken in a criminal case pursuant to the statute (1844, p. 476, § 11) relating to certain offences committed in the city of New York, may be read in evidence on the trial of an indictment *on proof* that the witness is a non-resident of the city at the time of the trial, and was so when the deposition was taken. (Reported, 1 Comstock, 386.)

STEPHEN WHITNEY, plaintiff in error, vs. JAMES P. ALLAIRE, defendant in error.—*Judgment affirmed.* EDWARD SANDFORD, for plaintiff in error; FRANCIS B. CUTTING, for defendant in error.

This case decided, that where one conveys or leases to another his right in real estate, an action will lie for a fraudulent representation as to the territorial extent of such right. Also, the measure of damages in such a case, &c., (Reported, 1 Comstock, 305.)

JOHN NOBLE and others, plaintiffs in error, vs. EDWARD C. HALLIDAY, defendant in error.—*Judgment of the Supreme Court reversed, and that of the Superior Court affirmed.* L. LIVINGSTON, for plaintiffs in error; EDWARD SANDFORD, for defendant in error.

This case decided that under the statute (2 R. S. 464, § 41, 42, &c.) it was sufficient for a receiver of an insolvent corporation, on an application for a warrant against a debtor of the corporation to make the requisite proof for such warrant, *by his own oath, on information and belief.* (Reported, 1 Comstock, 330.)

JOHN A. MOORE, appellant, vs. THEODORE DES ARTS, respondent.—*Decree affirmed.* H. S. DODGE, for appellant; DANIEL LORD, for respondent.

This was a case in relation to the right of a purchaser to recover of the importer the drawback of duties on goods if exported within three years, where they were declared duty free in the meantime and the importer received back the duties he paid. (Reported, 1 Comstock, 359.)

ERNEST FIEDLER, appellant, vs. FERDINAND SUYDAM et al., respondents.—*Decree affirmed.* G. H. MUMFORD, for appellant; E. DARWIN SMITH, for respondents.

This was a cause of claims to surplus moneys brought into court. No particular principle was settled by the decision. It was a question of priority of claims and the amount of interest to be allowed on the surplus, under a certain stipulation with the bank where it was deposited, and who were assignees to the second lien upon the fund. (Not reported.)

ROBERT KENDALL and other, plaintiffs in error, vs. ISAAC DOCTOR, defendant in error.—*Judgment affirmed.* J. L. BROWN, for plaintiffs in error; J. H. MARTINDALE, for defendant in error.

This was an action of trespass, assault and battery. The defendants pleaded the general issue. The evidence showed that one Lusk, a deputy sheriff, with the defendants Kendall and others, went to the Indian sawmill (so called,) which was in possession of one Waldron, as tenant, the business being carried on by Waldron and others, including the plaintiff, Doctor, (who as it appeared were all Indians,) for the purpose of re-

moving Waldron and all others found there from possession, by virtue of a warrant of possession issued by the first judge of Genesee County Courts, on behalf of Fellows, the owner of the mill. It appeared that Doctor and some of the others resisted Lusk in attempting to take the saw from the mill, when Lusk drew a pistol and pointed it at Doctor, saying he was in discharge of his duty, in executing process and they must not interfere; whereupon all the Indians withdrew from the saw-mill. The ground upon which the warrant issued was that the tenant was holding over without permission.

No justification under the warrant was pleaded by the defendants. The cause was tried upon the general issue. The circuit judge charged the jury, 1st, That if Deputy Sheriff Lusk used his pistol to intimidate the plaintiff (Doctor) but without any real intention to do him bodily injury, the act was an assault. 2d. That so far as the warrant was concerned, it was as though the defendants were at the mill without authority, with reference to the question whether a justification had been made out. 3d. That the delivery of the warrant to the officer to be executed would make the defendant Fellows, liable for all the acts of the deputy sheriff while in the due execution of it, unless the officer transcended the directions contained in it. 4th. That although the plaintiff had received no actual injury to his person, yet in his opinion the case was one which did not call for merely nominal damages, should they find for the plaintiff, but that he did not regard it as a case calling for heavy damages, still the question of damages was one peculiarly for the jury and in relation to which he could not control them. The jury found a verdict for the plaintiff for \$400 damages. The case was brought into the new Supreme Court of the 8th judicial district and decided at December term, 1847; new trial denied. No written opinion appears in the case. (Not reported.)

## COURT OF APPEALS.

JAMES F. DE PEYSTER and RICHMOND WHITMARSH, plaintiffs in error,  
vs. JOHN G. WINTER, defendant in error.

An action cannot be sustained by a plaintiff, for money had and received, upon a bill of exchange negotiated to the general agent of the plaintiff, without proving *affirmatively* that the money for which the bill was purchased, was the money of the plaintiff.

In the absence of such testimony it is the duty of the court to non-suit.

*Decided, June Term, 1848.*—This was an action of assumpsit brought by Winter against De Peyster and Whitmarsh, in the Superior Court of New York, in 1842, upon the following bill of exchange:

"Exchange for \$3000.

"Columbus, Geo., March 8, 1841.

Ninety days after date of the first exchange, second unpaid, pay to the order of Messrs. Kimbrough & Smith, three thousand dollars, value received, and charge the same to account of      Your ob't. s'ta.,

"KIMBROUGH & SMITH.

"To Messrs. De Peyster & Whitmarsh, New York."

(Endorsed, Kimbrough & Smith.)

"Rec'd June 12, 1841, from Messrs. De Peyster & Whitmarsh twelve hundred dollars on ac. of within bill of exchange, same as cash, on 9th of June.      "JOHN G. WINTER."

The declaration contained five counts. The first and second, counted specially upon a letter of credit given by De Peyster & Whitmarsh to Kimbrough & Smith. The third count was upon an acceptance of the bill of exchange. The fourth and fifth were the common money counts.

The defendants demurred to the first and second counts, and took issue upon the other three. Judgment was rendered to the defendants upon demurrer. The issues of fact were then tried before Vanderpoel, Justice, November term, 1843. Upon an order of discovery, the defendants produced in evidence, sworn copies from their books and papers, among others, the following letters, which were relied upon by the plaintiff as constituting De Peyster & Whitmarsh and Kimbrough & Smith, special co-partners:

"NEW YORK, 31st Oct. 1840.

"Messrs. De Peyster & Whitmarsh: Gents.—On the 19th instant we drew on you, 4 months date, under guarantee of Thos. R. Smith, Esq. for twenty-five hundred dollars; before maturity of this draft you will receive either a check or consignment of cotton, to cover the amount.

"It is our intention to consign to you here, or to your order in Liverpool, all such cottons as we may control for shipment to either port, and to use our exertions to make such shipments as large as possible. For the promotion of this object we propose to make advances on Georgia or Florida, to the extent of three quarters of the fair market value of such cottons, and to draw on you at not less than sixty days sight, for the amount of such advances, forwarding at the same time, either river or ship bills, lading and invoice. We further propose to make occasional purchases of small lots of cotton on joint account with you, when such lots offer at prices which, in our opinion, may be paid without risk of loss; for the amount of which we also propose to draw as above.

"In cases of advances we propose to divide equally all profit in shape of commission or exchange. In that of purchase, each party to charge the usual commission and the profit or loss to be equally divided. It is understood that all shipments shall be covered by open policy in this city.      "Very Respectfully,      "KIMBROUGH & SMITH.

"No advances to be made on shipments for Liverpool, except the vessel is ready to receive cargo."

"NEW YORK, November 3d, 1840.

"Messrs. Kimbrough & Smith: Gents. We have to acknowledge your communication of yesterday, and beg to add that our views agree with yours, except with regard to the insurance, which we shall expect to effect here on all property against which drafts are to be accepted by us. Having already so fully and freely exchanged our views and wishes, as to your operations with us, we have now only to ask your keeping us fully advised of any and all purchases, and of shipments either to Liverpool or this place; and especially of the drafts you are drawing, and on what account. In furtherance of the above, we shall duly honor your drafts at not less than sixty days, to the extent of twenty thousand dollars, provided the same be drawn before the 1st June next.

"Very Respectfully,      "DE PEYSTER & WHITMARSH."

A number of letters were then introduced, as evidence, from Kimbrough & Smith, to the defendants advising them of various shipments of cotton, drafts drawn, &c., up to the time of the draft in suit. The following is an extract of a letter dated Columbus, 7th March, 1841, from Kimbrough & Smith to the defendants, in relation to the draft in question, to wit: "We also make further draft at 90 days' date, for \$3000, making the amt. for which we draw on the 200 bales as per statement below; all which please honor.

"Very Respectfully,      "KIMBROUGH & SMITH."

This draft was protested, for non-acceptance.

The plaintiff next offered in evidence the examination of Isaac Prall, taken under a commission, to prove the negotiation of the draft to the plaintiff. This testimony is important, as showing the point upon which the whole case was finally decided. To the first interrogatory, he stated (substantially) that he was twenty-eight years of age; resided at Columbus, Georgia; his occupation was clerk. Knew the plaintiff; did not know defendants. To the second interrogatory, he answered (substantially) that he knew the draft in suit; that it was drawn on the 8th March, 1841, in Columbus, Ga., by G. W. Smith, of the firm of Kimbrough & Smith, and another bill was drawn the same day for the same amount as a duplicate. To the third interrogatory, he answered as follows: "he saith the said bill was negotiated to *Messrs. Davis & Plume*, their brokers, of the city of Columbus, by the payees thereof, on or before the 5th day of March 1841, in the city of Columbus, for and in consideration of the amount of money expressed on the face thereof, less thirty days' interest at 8 per cent. per annum. The same was endorsed by G. W. Smith, in the name of Kimbrough & Smith." To the fourth interrogatory, he answered (substantially) that the bill was taken and received upon the exhibition of a letter of credit, containing an agreement in relation to bills to be drawn by Kimbrough & Smith on the defendants; he could not produce the letter; it purported to be written by the defendants; was not acquainted with their handwriting, &c. To the fifth interrogatory he answered as follows: "he saith the said bill was negotiated to the plaintiff through *Messrs. Davis & Plume*, who had his funds for that use, on the 8th March, 1841, for the amount expressed in said bill, adding one per cent. prem." The remainder of the answer related to the contents of the letter of credit of the defendants. To the sixth interrogatory he answered, that the purpose of Kimbrough & Smith in negotiating the draft, was to raise money, which he believes was invested in cotton. To the seventh interrogatory he answered, that Kimbrough & Smith made shipments of cotton to Apalachicola, to be shipped to defendants at New York, to meet this bill and others, &c.

These answers contain the substance of Prall's testimony, upon direct interrogatories, bearing upon the point in the case.

The defendant's counsel then read his examination on the cross-interrogatories. First, answered, that he was not interested. Second: the answers were made upon his own knowledge of the facts stated. Third: knew there was such a draft; had it in his possession as the book-keeper of *Davis & Plume*. Fourth: "he had fully answered this question, but would repeat, the said bill was sold to or contracted for to *Messrs. Davis*



*& Plume*, by G. W. Smith, for the amount expressed on the face, less 30 days' interest off at 8 1-2 per cent. per annum, for money for the purpose of buying or paying for cotton already purchased." Fifth and sixth: he had already answered in the direct interrogatories. Seventh: he knew of no authority given to the persons who took the bill for plaintiff's account, than that they were acting as his general agents. Eighth: "*the said bill was first purchased from G. W. Smith with the money of Davis & Plume, the plaintiff did have money in the hands of Davis & Plume, at the time of the negotiation to the amount of \$7000, the money placed in their hands prior to the drawing of said bill, to be invested in northern exchange.*" Ninth: the plaintiff had not to his knowledge claimed, nor did not then claim of the persons referred to in the fifth direct interrogatory the amount of the said draft, or any part thereof, nor did he hold them liable. The answers to the remainder of the cross-interrogatories were principally in relation to the letter of credit, and the buying and shipping cotton by Kimbrough & Smith to the defendants.

The defendants moved for a non-suit, which was denied, and they excepted:—the judge intimating his intention to reserve all the questions for the consideration of the court. The defendants then called a witness, a book-keeper of the defendants, in 1841, and proved the payment endorsed on the draft (\$1200,) which was paid to plaintiff by the defendants as all the proceeds of sales on account of Kimbrough & Smith of which they were possessed up to that time. That the draft was presented for acceptance to defendants and protested for non-acceptance. It was afterwards presented for payment, the day after it was due.

The defendants' counsel requested the judge to charge—That the plaintiff could not recover upon the bill as an accepted bill. 1st. The letter of credit was not an unconditional promise to accept under the statutes. 2. The terms upon which the defendants agreed to accept, had not been complied with; the defendants were sureties and the plaintiff was bound to show a strict compliance with those terms. 3. The drawers and drawees of the bill were not partners, nor in any manner jointly interested in the drawing thereof; but even if they were, still, the mere drawing of the bill was not an acceptance thereof. 4. There was no condition annexed to the consignment, nor any directions given as to paying the bill out of the proceeds thereof, which could by the receipt of cotton in any manner constitute an acceptance of the bill.

That the plaintiff was not entitled to recover under the common counts of his declaration, even though there was a partnership between the defendants and Kimbrough & Smith, because, 1. The plaintiff never lent

and advanced any money to the defendants nor to Kimbrough & Smith, for their use. The plaintiff's dealings were entirely with Davis & Plume, the endorsers and holders of the bill, and in no way with Kimbrough & Smith; the plaintiff obtained the bill by discounting the same. 2. The bill was a general bill, and was at most a mere equitable assignment of the moneys in the defendants' hands, belonging to the drawers; it did not assign the cotton, nor the proceeds thereof, so as to give the plaintiff or other holder of the bill a right of action against the defendants for money had and received.

The court charged, that by the letters between Kimbrough & Smith, of October 31, 1840, and November 3, 1840, which, by the order made on the affidavit for discovery, appeared to apply to each other, the defendants and Kimbrough & Smith became jointly interested as co-partners in the consignments of cotton therein contemplated to be made, as to advances thereon or joint purchasers thereof, and were liable as such for the acts of each other in the scope of that special co-partnership. That the defendants were apprized by the letters of Kimbrough & Smith to them, of March 5, 6 and 7, of the terms on which the consignments therein mentioned were made to them, and of advances by bills drawn on the defendants by Kimbrough & Smith, including the bill in question; and that by receiving the said consignments and selling the same after such notice, they had in law adopted the same as a co-partnership transaction; and if the jury should find in fact that the money for which the bill in evidence was given was applied to the advance on or purchase of the cotton which was so consigned, or to the repayment of such advance or purchase, and was the plaintiff's money, then the defendants were liable in this action under the issues joined between the parties, and the plaintiff would be entitled to recover the amount of the bill, crediting the payment thereon with interest from the time it fell due.

Defendants' counsel excepted to each and every part, and the whole of the charge. The jury rendered a verdict for the plaintiff of \$2230. In November term, 1844, the court, on argument of the bill of exceptions, denied a new trial. The defendants carried the case to the Supreme Court, where, in November term, 1847, in the first judicial district, the judgment of the Superior Court was affirmed. No written opinion was given by the Supreme Court.

M. S. BIDWELL, *for plaintiffs in error.*

DANIEL LORD, *for defendants in error.*

By the Court, JEWETT, Ch. J.—It was agreed by the counsel on the argument that, waiving all other questions made by the bill of excep-

tions, the judgment of the court below could not be sustained unless upon the ground that the plaintiff gave sufficient evidence to submit to the jury, to find that the defendants and Kimbrough & Smith became jointly interested as co-partners in the consignments of cotton contemplated to be made by the latter to the former as described in the letter of Kimbrough & Smith to the defendants, under date the 31st day of October, 1840, and the letter of the defendants to Kimbrough & Smith in answer, dated 3d November, 1840, and that the money for which the bill of exchange for \$3000, dated 8th March, 1841, was given, was the plaintiff's, and was applied to the advance on, or for the purchase of cotton so consigned by Kimbrough & Smith to the defendants, or to the repayment of such advance or purchase.

As regards the alleged partnership between the firm of the defendants and Kimbrough & Smith in respect to the purchase and consignment of the cotton, I am of the opinion that the evidence was sufficient to go to the jury to find that fact.

The only evidence given to show that the money for which the bill of exchange was drawn was the plaintiff's, is the testimony of Isaac Prall, taken under a commission at the instance of the plaintiff. Prall was, at the time of the transaction, book-keeper of Davis & Plume, brokers in the city of Columbus, Georgia, the place of residence of Kimbrough & Smith. This testimony shows that the bill of exchange in question was actually drawn on the eighth day of March, 1841, at Columbus, by Smith, one of the firm of Kimbrough & Smith, and by him on that day delivered to Davis & Plume, from whom he then received the amount for which it was drawn, less thirty days' interest at eight per cent., having previously on the fifth of that month been negotiated by Kimbrough & Smith to Davis & Plume. Whether the money which Kimbrough & Smith received of Davis & Plume was in fact the money of the plaintiff and advanced for the bill by them as his agents, is not affirmatively shown by the testimony of the witness. It is true, that in answer to the fifth direct interrogatory, the witness testified that said bill was negotiated to the *plaintiff* through Davis & Plume, who had his funds for that use, on the eighth day of March, 1841, for the amount expressed in said bill, adding one per cent. premium. But the witness in answer to the fourth cross-interrogatory says, "the said bill was sold to, or contracted for to Messrs. *Davis & Plume* by G. W. Smith, for the amount expressed on the face, less thirty days' interest off at 8 per cent. per annum. And again in his answer to the eighth cross-interrogatory, he testified that "the said bill was *first* purchased from G. W. Smith with *the money of Davis & Plume.*"

He, however, adds that "the plaintiff did have money in the hands of Davis & Plume, at the time of the negotiation to the amount of over seven thousand dollars, the money was placed in their hands prior to the drawing of said bill to be invested in northern exchange."

In my opinion, the testimony of this witness does not amount to *any evidence* of the fact, incumbent upon the plaintiff to prove, that the money paid for the bill, by Davis & Plume, was the plaintiff's; and on that ground the Superior Court erred in refusing to non-suit the plaintiff and in submitting to the jury to find that fact from the evidence so given. This conclusion makes it unnecessary to discuss the various other questions raised by a bill of exceptions. The judgments should be reversed and a *venire de novo* awarded by the Superior Court of the city of New York. Costs to abide the event.



# INDEX.

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All cases reported in the Court of Appeals, will be found under the head of "COURT OF APPEALS," in the order of time in which they were decided.

Some errors will be found in the volume; but none, it is believed, but what their correction will be readily suggested, without a particular reference to them.

This volume commenced in July, 1849, and ended in September, 1850.

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ACTIONS, the old suit in equity for the "*partition of lands*," is now merged in the "*civil actions*" under the code, and as such, may be prosecuted by summons and complaint. *Myers agt. Rasback*, 83.

an action for breach of promise of marriage, is within the class specified in the first subdivision of the 129th section of the code, where the summons is issued in conformity therewith. *Williams agt. Miller*, 94.

it is an action arising on contract, and is for the recovery of money only, *id.* an action cannot be maintained against a subscriber to a voluntary subscription paper. No consideration to uphold the promise. *Stoddard agt. Cleveland*, 148.

*Action for divorce.* See HUSBAND AND WIFE; *Hallock agt. Hallock*, 160.

action against sureties as endorsers jointly liable. See SURETIES; *Bradford agt. Corey*, 161.

it seems, an action in the nature of a creditor's bill, against the judgment debtor, and others colluding with him to defraud the creditor may be commenced. *Davis agt. Turner*, 190.

see HUSBAND AND WIFE; *Coit agt. Coit*, 232.

in an action (under the code) against several defendants to recover damages for the breach of the contract, *held*, that the plaintiff must recover against all the defendants or not at all, unless in one of the excepted cases provided by statute, that is, where the defendants hold different relations to the plaintiff, and where "*a several judgment may be proper*," (code, § 274,) 272.

thus, where one defendant moved for a commission to examine a co-defendant under § 397, *held*, that the papers not showing that a several judgment would be proper, a *prima facie* case was not made out for a commission, *id.*

ACTIONS—*continued*.

an action against a foreign corporation, is now, as a *suit* was formerly, a proceeding against its property only, unless there is a voluntary appearance by the defendant. *Hulbert agt. The Hope Mutual Ins. Co.*, 275, 415.

the service of a summons upon a president of such corporation who happens to be temporarily in this state, and who does not voluntarily appear, does not give the court jurisdiction of the defendant, for the purpose of rendering personal judgment upon contracts made in this state, or for debts due to residents of this state. Such a service must be regarded as a statutory notice that proceedings are about to be instituted against the defendant's property, *id.*

it is not required (code, §227) that the attachment should accompany the service of the summons. It may be served afterwards, *id.*

an action on the case for negligence, sounds in *tort*, and a defendant therein may be arrested on a *ca. sa.* *Burkle agt. Ellis*, 288.

a breach of the duty of a common carrier is a breach of the law, for which an action lies founded on the common law, and which wants not the aid of a contract to support it, *id.*

although an action of assumpsit will lie in such a case, upon an implied contract, yet, in an action on the case founded on the breach of the law it must be regarded as sounding in *tort*, *id.*

Action against sheriff for escape. See *SHERIFF*; *Tanner agt. Hallenbeck*, 297. see *HUSBAND AND WIFE*; *Tippel agt. Tippel*, 346.

a summons issued against a corporation by its *corporate name*, and subsequently a declaration issued against the *trustees by name*, without any reference to a suit having been commenced by summons, *held*, that they might be treated as two separate suits. *Lucas agt. The Baptist Church*, 353.

an action brought against a sole defendant, to recover the possession of land, may be continued after the death of the defendant intestate, against his heirs-at-law claiming to have succeeded to his legal rights and to own the land. *Walderph agt. Bortle*, 358.

an action to recover real property should be brought against the person in the actual occupation or possession; and add all persons who claim an interest in the controversy adverse to the plaintiff, *id.*

see *REAL ESTATE*; *Cooke agt. Passage*, 360.

the code may abolish the *forms* of actions, but the *principles* which govern them are retained. An action based upon *carelessness or negligence* cannot be referred. *McMaster agt. Booth*, 427.

an action cannot be sustained by a plaintiff for money had and received, upon a bill of exchange negotiated to the general agent of the plaintiff, without proving *affirmatively* that the money for which the bill was purchased was the money of the plaintiff. *De Peyster and Whitmarsh agt. Winter*, 449.

in the absence of *such* testimony, it is the duty of the court to *non-suit*, *id.*

**AFFIDAVIT**, the form an affidavit of merits, upon a motion to change the place of trial, should correspond with the former practice and decisions. *Lynch agt. Mosher*, 86.

in an affidavit upon which an *order of arrest* is to be founded (§ 181,) two things must appear. 1st, that a sufficient cause of action exists. 2d, that it is among those specified in the 179th section. *Pindar agt. Black*, 95.

**AFFIDAVIT**—*continued.*

the *entitling the affidavit in a suit*, may now be disregarded under § 176 of the code, as not affecting the substantial rights of the adverse party, *id.*  
 an affidavit verifying a pleading is defective (subject to amendment) in using the words "information *and* belief," instead of saying "information *or* belief," as required by § 157. *Davis agt. Potter*, 155.  
 see IRREGULARITY; *Anonymous*, 290.

**AMENDMENT**, see SUMMONS AND COMPLAINT; *Walker agt. Hubbard*, 154.

an affidavit verifying a pleading is defective (subject to amendment) in using the words "information *and* belief," instead of saying "information *or* belief," as required by § 157. *Davis agt. Potter*, 155.

**ANSWER**, the court may allow an answer to the complaint to be put in after 20 days.

*Allen agt. Ackley*, 5.

an answer will be stricken out, on motion, where it states facts which do not constitute a defence, and is immaterial as between the defendant and plaintiff, but is intended to form a case for adjudication of equities between co-defendants, under § 230 of the original code. *Woodworth agt. Bellows*, 24.

the facts stated in a complaint are to be taken as true by a defendant who does not answer, but he is not to be deemed as admitting anything contained in the answer of a co-defendant, in which he has not participated, *id.*

if an answer of a defendant stood before the court as proved or admitted, by a co-defendant (not answering,) *it seems*, that it would form a case for adjudication of equities under § 230 of the code, *id.*

an answer verified according to the first code and served on the day of the passage of the second code, held, properly verified. *Gamble agt. Beattie*, 41.

an answer which denies a material allegation in the complaint, cannot be stricken out as "frivolous." *Davis agt. Potter*, 155.

what are "false," "frivolous" and "sham" answers, as contemplated by the code, *id.*

where a defendant is allowed to answer on payment of costs, the court will not impose the further condition that the defendants shall not set up the defence of usury. *Grant agt. McCoughin*, 216.

when facts material to the defence occur after the joining of issue, leave will be given, on motion, to set them forth in a supplemental answer, and the plaintiff will have 20 days to reply to such supplemental answer. *Radley agt. Houghtaling*, 251.

where a defendant denied the whole of plaintiff's complaint (which was for taking sundry articles of personal property) by alleging generally that he "denies each and every allegation alleged in said complaint," held sufficient, and a complete denial to the whole complaint. *Kellogg agt. Church*, 339.

an answer which alleged that the plaintiff who brought the action was not the real party in interest, nor an executor or administrator or a trustee of an express trust, or a person expressly authorized by statute to sue without joining with him the person for whose benefit the suit is prosecuted, held bad on demurrer, for the reason that it did not state the facts upon which the defendant relied to sustain his allegation that the plaintiff had no right to sue. *Russell agt. Clapp*, 347.



ANSWER—*continued.*

a defendant cannot both demur to and answer at the same time, a single cause of action alleged in the complaint. *Slocum agt. Wheeler*, 373.

**APPEAL**, an appeal to the special term on a bill of exceptions taken at the circuit, under the code, is irregular, *where the suit was commenced before the passage of the code.* *Clark agt. Crandall*, 127.

appeal taken from an order of a surrogate. See **PRACTICE**; *Suffern agt. Lawrence*, 129.

an appeal, in a case commenced in Chancery and pending in the Supreme Court, on the *first Monday* of July, 1847, under § 460 of the code, which provides that an appeal may be taken from a final decree, &c. pending in the Supreme Court on the *first day* of July, 1847, *held*, to be authorized by and to come within the object and intent of that section. The section was not unconstitutional. It affected the remedy only. *Burch agt. Newbury*, 145.

the right to appeal is not lost, where the collection of costs is coerced—is not voluntary, *id.*

no appeal can be taken to the Supreme Court from the order of a County Court reversing the judgment of a justice of the peace, where the County Court has ordered a new trial. *Burnett agt. Harkness*, 158.

where an appellant elects to dismiss his own appeal, he must enter an order to that effect, *and pay the respondent's costs, id.*

see **TRIAL**; *Pepper agt. Goulding*, 310.

an appeal does not lie from the special to the general term upon an order *refusing to strike out* of a pleading alleged immaterial, impertinent or scandalous averments. *Whitney agt. Waterman*, 313.

see **COSTS**; *Taylor agt. Seeley*, 314.

see **JURISDICTION**; *Matter of Hicks' Will*, 316.

what orders involve the merits, and are appealable from the special to the general term, stated. *St. Johns agt. West*, 329.

where there are several issues of law and fact, an appeal does not lie until the final determination of all of them. *Bentley agt. Jones*, 335.

nor does an appeal lie from a judgment until it is entered and perfected. The time for appealing begins to run on service of notice of the entering of the judgment, *id.*

an order of a single justice refusing to strike out matter as irrelevant and redundant in a pleading, is not an appealable order to the general term. What are appealable orders, as settled in the second judicial district. *Bedell agt. Sickles*, 432.

an appeal from a *surrogate's* order, admitting or refusing to admit a will to probate should, in the *first instance*, be heard at *general term*. *Watts agt. Aulin*, 439.

**ARREST**, see **AFFIDAVIT**; *Findar agt. Black*, 95.

see **ACTIONS**; *Burkle agt. Ellis*, 288.

**ASSAULT AND BATTERY**, no more costs than damages can be recovered under the code, in cases of assault and battery where the damages are less than \$50. *Holmes agt. St. John*, 66.

ASSAULT AND BATTERY—*continued*.

where three defendants were sued in an action of assault and battery, and appeared separately and defended by different attorneys, a verdict rendered against one of them, and the other two acquitted; *held*, that under sections 304 and 305 of the code, the defendants acquitted were entitled to costs against the plaintiff. Section 306 was held to refer to equity causes of action as formerly understood. *Hinds agt. Myers*, 356.

ATTACHMENT, see INJUNCTION; *Krom agt. Hogan*, 225.

see ATTORNEY; *Cottrell agt. Finlayson*, 242.

a solicitor for plaintiff in a partition suit is not liable to be attached for not paying to one of the commissioners his fees included in the taxed bill and collected from the defendants. *Lamoreux agt. Morris*, 245.

see ACTIONS; *Hulbert agt. The Hope Mutual Ins. Co.*, 275.

an attachment may issue against a person as a non-resident, under § 227 of the code, who is a temporary resident of this state with his family, where it appears he has recently resided out of the state, but at present is unsettled. *Burrows agt. Miller*, 349.

an attachment may issue in the first instance by a judge, under § 302 to punish, as for a contempt, all disobedience of orders made by him in "proceedings supplementary to the execution," or an order to show cause may be issued first. In either case, copies of the affidavits upon which the application is founded should be served. *In the matter of Smethurst*, 369.

see POWER; *id.*

the sufficiency of affidavits upon which an attachment issues cannot be reviewed on *habeas corpus*, *id.*

ATTORNEY, an attorney is only liable for costs (§100) where the defendant could have required security to be filed in the cause. *Hulbert agt. Newell*, 93.

an attorney's lien for costs must yield to the equitable right of set-off. The latter claim in equity overrides the former. *Ferguson agt. Bassett*, 168.

see SET-OFF; *id.*

an attorney is liable to be proceeded against by attachment, if he fails to pay over money collected for his client, on demand. *Cottrell agt. Finlayson*, 242.

but the bringing an action and recovery of a judgment against the attorney, is a waiver of the right to an attachment, *id.*

an attachment will not issue against an attorney, without a previous demand of payment, *id.*

see ATTACHMENT; *Lamoreux agt. Morris*, 245.

*it seems*, that under the code, an attorney cannot claim a lien for costs upon a judgment. *Davenport agt. Ludlow*, 337.

CASE AND BILL OF EXCEPTIONS, see PRACTICE; *Thompson agt. Blanchard*, 210.

a case cannot be turned into a *bill of exceptions* or *special verdict*, after judgment of the Supreme Court upon it, without a stipulation to that effect at

CASE AND BILL OF EXCEPTIONS—*continued*.

the trial, or its being made a part of the order or entry of the verdict. *Smith agt. Caswell*, 286.

see PRACTICE; *Lynde agt. Cowenhoven*, 327.

a defendant in a criminal case is bound to furnish, upon bill of exceptions, printed papers for a hearing, the same as in other cases. *The People agt. —*, 417.

see TRIAL; *Graham agt. Milliman*, 435.

CERTIORARI, a return to a certiorari made by a judge, who was out of office before the service of the certiorari upon him as a nullity; otherwise with a justice of the peace. *Peck agt. Foot*, 425.

CLERK, see SHERIFF; *Jenkins agt. McGill*, 205.

an official statute certificate of a copy of a paper or document signed by a deputy clerk, without stating or appearing that the clerk was absent is valid. *Lucas agt. the Baptist Church*, 353.

COMPLAINT, a complaint may be verified by oath after service, upon motion. *Bragg agt. Bickford*, 21.

see PLEAS AND PLEADING; *Glenny agt. Hitchins*, 98.

see PLEAS AND PLEADING; *Shaw agt. Jayne*, 119.

a complaint sworn to before the plaintiff's attorney is an irregularity, but not a nullity. The remedy is by motion to set it aside. *Gilmore agt. Hempstead*, 153.

where a complaint was issued, without any reference whatever to the court, except in the title at the commencement "Sup. Court," held that it sufficiently named the court under § 142. The summons issued with the complaint, which made no mention whatever of any court, held that it might be amended under § 173, 176. *Walker agt. Hubbard and others*, 154.

an amended complaint may be served of course, at any time within twenty days after an amended answer is served. *Seneca County Bank agt. Garlinghouse*, 174.

an amended pleading takes the place of and supersedes the original, *id*.

The objection that the complaint does not contain facts sufficient to constitute a cause of action, may be raised by a demurrer, which merely specifies the ground of objection in the language of the statute. *Durkee agt. Saratoga and Washington R. R. Co.*, 226.

separate causes of action, all arising out of the same class, may be united in the same complaint, provided they are separately stated, *id*.

the separate stating, requires a count, or its equivalent, for each cause of action, *id*.

see IRREGULARITY; *Anonymous*, 290.

a complaint may be dismissed if not served within a reasonable time (it seems, twenty-four hours,) after demand, pursuant to § 130 of the code. *Littlefield agt. Murin*, 306.

see PRACTICE; *id*.

see PLEAS AND PLEADING; *Cahoon agt. The Bank of Utica*, 423.

CONSIDERATION, there is no consideration to uphold a promise, upon which an action can be maintained in a voluntary subscription by an individual to a voluntary subscription paper. *Stoddard agt. Cleveland*, 148.

CONTRACT, an action for a *breach of promise of marriage* is within the class specified in the first subdivision of the 129th section of the code, where the summons is issued in conformity therewith. It is an action arising on contract, and is for the recovery of money only. *Williams agt. Miller*, 94.

*held*, that the marriage relation is not created by what is understood to be a contract, in the strict common law sense of that term, and is not in what popular language and common parlance is understood by the word contract. The Legislature always have power to dissolve it. It is not a contract within the spirit and meaning of the prohibitory clause of Art. 1, Sec. 10, 1st sub. of the constitution of the United States. *White agt. White*, 102.  
(*Quære? Whether the doctrine in the two cases above are not adverse.*)

CORPORATION, when a corporation is dissolved, and when a receiver will be appointed where a corporation ceases to act, &c. *Conro agt. Gray*, 166.

*Foreign Corporation.* See ACTIONS; *Hulbert agt. The Hope Mutual Ins. Co.*, 275.

see ACTIONS; *Lucas agt. The Baptist Church*, 353.

COSTS, costs made after judgment, upon a motion for a new trial, must be collected by a process in the nature of a *fi. fa.* *Buward agt. Gros*, 23.

a party cannot be imprisoned for the non-payment of such costs, *id.*  
the court has a right to review costs as settled and adjusted by a clerk. *Whipple agt. Williams*, 28.

costs for attendance at circuit, should be moved for the first opportunity, *id.*  
plaintiff cannot recover costs of circuit where he alone notices the cause for trial, and has an opportunity to try, but does not, *id.*

costs of motion will not be allowed, if the notice of motion asks for more than the party is entitled to, *id.*

whether, in cases within § 306, referees can pass upon the question of costs, *quære.* *Van Valkenburgh agt. Allendorphs*, 39.

costs of appeal (\$45) to the general term, upon a bill of exceptions taken at the circuit, may be allowed to a plaintiff upon a final recovery, where the action comes within § 304 of the code. *Livingston agt. Miller*, 42.

see also to the same point, (appeal upon a judgment entered upon a report of a referee.) *Wilson agt. Allen*, 54.

see PER CENT; *Willard agt. Andrews*, 65.

costs must be governed by the code in suits pending when it took effect. *Holmes agt. St. John*, 66.

in cases of assault and battery, no more costs than damages can be recovered, where the damages are less than \$50, *id.*

the same in cases of libel. *Taylor agt. Gardner*, 67.

necessary disbursements and fees of officers allowed by law, may be recovered by the prevailing party in such cases. (*There are adverse decisions on this point.*) *id.*

see PER CENT; *Sackett agt. Ball*, 71.

COSTS—*continued.*

costs upon an appeal under the 349th section of the code, must be governed by the 315th section, (it is considered a motion,) *Savage agt. Darrow*, 74.

a fee of \$12 for the trial of a cause is allowable in an action at issue, where the plaintiff fails to appear when the cause is called upon the calendar, and the defendant takes an order that the complaint be dismissed. *Dodd agt. Curry*, 123.

see FEES and DISBURSEMENTS; *Newton agt. Sweet*, 134.

where the collection of costs is coerced and the payment is not voluntary, it does not deprive the party paying them to his right of appeal. *Burch agt. Newbury*, 145.

where appellant elects to dismiss his own appeal, he must enter an order to that effect, and pay the respondent's costs. *Burnett agt. Harkness*, 158.

where the court direct that "no costs are allowed," upon granting a motion in an interlocutory order, no costs for such motion can be taxed in the final costs in the cause, 164.

costs of an appeal, (or a suit) commenced in chancery prior to the first day of July, 1848, and decided since the passage of the amended code, must be taxed according to the fees allowed in chancery, under the old fee bill. *Truscutt agt. King*, 173.

an application for costs cannot be made in a proceeding supplementary to an execution, until the proceeding has been brought to an end in favor of the party so applying. *Davis agt. Turner*, 190.

the necessary disbursements and fees of officers allowed by law, under the code, cannot be recovered by the prevailing party, where he is not entitled to recover costs. *Belding agt. Conklin*, 196.

(*This case is adverse to Taylor agt. Gardner*, 67, and *Newton agt. Sweet*, 134.)

a creditor suing an executor is not entitled to recover costs on the ground that the latter did not advertise for the presentation of claims. When the plaintiff is entitled to costs against an executor. *Snyder agt. Young*, 217.

where costs were improperly, and without leave of the court, included in the entry of judgment, they were ordered to be stricken out on motion, *id.*

a district attorney can only charge for two subpoenas for the same witness in the same case, from the commencement of the prosecution before the grand jury to its conclusion by verdict and final judgment. *Matter of B. Slosson, Dist. Attor.*, 236.

Under the code, a sheriff is not entitled to double costs where he recovers judgment. *Hallenbeck agt. Miller*. (*There are adverse decisions on this point*.) 239.

under the code, a constable is entitled to recover double costs, where he recovers judgment. *Murray agt. Haskins*. (*This is adverse to Hallenbeck agt. Miller, above*.) 263.

in an action of slander, where the plaintiff recovered less than \$50 damages, held, that he was not entitled to recover the fees of officers and disbursements in addition to the amount of costs equal to the verdict. *Wheeler agt. Westgate*, 269.

(*This case concurs with Belding agt. Conklin*, 196.)

to entitle a party to costs under § 315 of the code, they must be given in the order upon the motion, and the amount must be fixed by the court, not exceeding \$10. *Chadwick agt. Brother*, 283.

double costs under the statute may be allowed to a sheriff, sued as such (under the code,) where he succeeds in the suit, *id.*

(*This decision concurs with Murray agt. Haskins*, 263.)

## COSTS—continued.

a referee to whom the whole cause is referred has power, and is required in cases falling under § 306 of the code, to decide the question of costs. His power in this respect is the same as that of a judge of this court at special term. *Graves agt. Blanchard*, 300.

a discontinuance without the payment of costs, is a nullity. Costs of motion cannot be taxed in the final costs, unless fixed by the court in the order. *Morrison agt. Ide*, 304.

the allowance provided in § 307 of the code, "for all subsequent proceedings before trial, seven dollars," is not chargeable till the cause has been noticed for trial, *id.*

where an appeal from a judgment of a justice of the peace, is heard by the Supreme Court, because of the incompetency of the county judge, the successful party will recover the same costs as if the appeal had been decided by the county judge. *Taylor agt. Seeley*, 314.

it seems, that under the code, an attorney cannot claim a lien for costs upon a judgment. *Davenport agt. Ludlow*, 337.

where two defendants were acquitted and one convicted in an action of assault and battery, *held*, that the two acquitted were entitled to costs against the plaintiff, under § 304 and 305 of the code. *Hinds agt. Myers*, 356.

where an appeal is dismissed with "costs on the appeal and costs of motion," the respondent is not at liberty to issue a *fieri facias* to collect such costs, until their amount has been liquidated by or under the direction of the court. *Eckerson agt. Spoor*, 361.

nor can a *fi. fa.* be regularly issued in such case, till steps have been taken to bring the party into contempt, *id.*

when a term fee, \$10, will be allowed on appeal from County Court, &c. *id.*  
costs in suits pending on the 1st day of July, 1848, except costs of motions, on final determination in the Court of Appeals, must be taxed under the fee bill and statute regulating costs in the Court for the Correction of Errors. *Doty agt. Brown*, 429.

what costs are recoverable on a case reserved, motion for review, or rehearing, *quere.* *Graham agt. Milliman*, 435.

a defendant against whom a judgment is obtained for a less amount than he offered in writing, to allow judgment to be taken against him, under § 385, is entitled to costs against the plaintiff, from the time of the offer.

such defendant is not entitled to an extra allowance under § 308 and 309. *McLees agt. Avery*, 441.

COURT OF APPEALS, an attorney should not wait until the last day but one before mailing a notice of argument to the clerk for the calendar without a sufficient excuse. *Wilkin agt. Pearce*, 26.

the verdict of a jury upon a question of fact, upon the trial of which there is a question as to the credibility of the witnesses by which it is sought to be proved, is a final determination of the case. *Rice agt. Floyd*, 27.

an order, decree or judgment of the court which contains a provision for a reference of certain matters, &c. is not appealable. It is not the final order contemplated by the code. *Harris agt. Clark*, 78.

a motion upon notice will not be allowed to be taken by default, where it in-

COURT OF APPEALS—*continued.*

interferes with the power of the court in controlling their calendar. *Craiss agt. Rowley*, 79.

an order of reference to ascertain the amount of damages occasioned by a temporary injunction, is not an appealable order to this court. *Anonymous*, 80.

it seems, that under the code (§ 12) a remittitur sending the proceedings to the court below, is not authorized on the *dismissal of an appeal*. (Subsequent decisions hold otherwise and correct the report in this case. *McFarlan agt. Watson*, 128.

an order setting aside a decree of divorce, taken as confessed, and allowing alimony, &c. is not an appealable order to this court. *Carpenter agt. Carpenter*, 139.

an order setting aside an answer as frivolous, and that the plaintiff have judgment as for want of an answer, and a further order that the defendant submit to an examination on oath concerning his property, and the judgment to be given on the complaint is not an appealable order to this court. *Dunham agt. Nicholson*, 140.

the usual terms required by the court in opening a regular default upon what may be considered, the ordinary excuse. *Conant agt. Vedder*, 141.

ORGANIZATION: *First Term, July*, 1847, 142.

DECISIONS: *September Term*, 1847, 143.

DECISIONS: *November Term*, 1847, 181.

The report of the case of *McFarlan agt. Watson*, p. 128, in relation to sending a remittitur to the court below, on the dismissal of an appeal, corrected, 184.

an order of the Supreme Court, reversing a final decree of a surrogate in a proceeding for an account, and directing the proceedings to be remitted to the surrogate with instructions, &c., is an appealable order to this court. *Wagener agt. Reiley*, 195.

the 7th rule of this court applies to appeals pending when the rule was adopted. *Dresser agt. Brooks*, 207.

after a return has been filed, any order made which finally disposes of the appeal whether upon the merits or not, it is proper to remit the proceedings to the court below, *id.*

after a cause has been regularly remitted to the court below, this court has no jurisdiction to grant relief. The only remedy is a new appeal, *id.*

where too much costs are charged in a case, the remedy is by motion to the court below, *id.*

an additional allowance pursuant to § 308 of the code, cannot be made by this court. It is confined to the court of original jurisdiction, and in reference to the trial in that court. *Wolfe agt. Van Nostrand*, 208.

on an appeal from a judgment where one of several defendants, who appeared by one attorney, recovered a certain sum, and three other defendants, who appeared by a different attorney, recovered a different sum against the plaintiff, both sums included in one record; and on bringing the appeal the plaintiff gave an undertaking pursuant to § 335, covering both sums, and also one pursuant to § 334. *Held*, sufficient. Not necessary to give two undertakings, pursuant to § 334. *Smith agt. Lynes*, 209.

an appeal is "perfected" within the meaning of the code, (and rule 2d and 7th

COURT OF APPEALS—*continued*.

of this court, which follow the code,) when the proper undertaking with an affidavit of the sureties has been executed, and notice of the appeal has been served on the adverse party and on the clerk with whom the judgment or order was entered. And the 20 days under rule 2d, and the 40 days under rule 7th, commence running from that time. *Thompson agt. Blanchard*, 210.

Directions as to appeals and proceedings where suits were commenced before the code, and determined afterwards. *Farmers' Loan and Trust Co. agt. Carroll*, 211.

the awarding or refusing an issue to be tried at law, and the granting or refusing a new trial, are matters resting entirely in the discretion of the chancellor. Such orders are not the subjects of appeal to an appellate court. *Quare?* Whether they are the subject of review, when the final order upon the merits is considered. *Lansing agt. Russell*, 213.

a decree which directs a reference for the purpose of taking and stating an account, &c., and reserving further directions until the coming in and confirmation of the report, &c., is not such a final decree that an appeal lies to this court. Although it may be final in many particulars. *Cruger agt. Douglass*. (See *Harris agt. Clark*, p. 78,) 215.

DECISIONS: *November Term*, 1847, *continued and concluded*, 222.

DECISIONS: *January Term*, 1848, 291.

an appeal will not lie to this court from an order of Supreme Court at general term, reversing a judgment obtained at the circuit and *ordering a new trial*. *Duane agt. Northern Railroad*, 364.

DECISIONS: *April Term*, 1848, 365.

see COSTS; *Doty agt. Brown*, 429.

DECISIONS: *June Term*, 1848, 442.

an action cannot be sustained by a plaintiff for money had and received upon a bill of exchange negotiated to the general agent of the plaintiff, without proving *affirmatively* that the money for which the bill was purchased was the money of the plaintiff. *DePeyster and Whitmarsh agt. Winter*, 449.  
in the absence of *such* testimony, it is the duty of the court to *non-suit*, *id*.

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DEMURRER, *held*, no cause of demurrer to a complaint, because the plaintiff claimed a *sum certain*, on account of the defendant's breach (of a contract to deliver flour,) without setting out an *account current* with the defendants. The requisites of the complaint in such case stated. *Enos agt. Thomas*, 48.

a demurrer, under the code, must *distinctly specify* the grounds of objection; unless it do so it may be disregarded. *Glenny agt. Hitchins*, 98.

held, no ground of demurrer to a creditor's bill, that it did not show that a transcript of the judgment was docketed in the county where one of the several defendants resided, it not appearing from the face of the bill *that the judgment debtor had real estate subject to the lien of the judgment*, in that county. *Millard agt. Shaw*, 137.

held, no ground of demurrer to a creditor's bill, that it did not set out the legal effect, force or form of the consent (of the defendant) by which the execution was issued immediately, and made returnable in six days from the time of docketing the judgment, *id*.



DEMURRER—*continued.*

see PLEAS AND PLEADING; *Bentley agt. Jones*, 202.

the objection that the complaint does not contain facts sufficient to constitute a cause of action, may be raised by a demurrer which merely specifies the ground of objection in the language of the statute. *Durkee agt. The Saratoga and Washington R. R. Co.*, 226.

a decision of the court upon a demurrer is not an order but a judgment. *Bentley agt. Jones*, 335.

a defendant cannot both demur to and answer at the same time, a single cause of action alleged in the complaint. *Slocum agt. Wheeler*, 373.

a demurrer will not lie to a part of an entire defence. *Cobb agt. Frazee*, 413.

DISCOVERY, a discovery of books and papers in the possession of the adverse party, may be compelled by the court, in any case where they bear upon the merits of the action. *Powers agt. Elmendorf*, 60.

such discovery may be had, where one party desires to ascertain what documentary evidence his adversary holds upon which he is relying to sustain himself upon the trial, *id.*

all proceedings instituted under § 388 of the code, must be governed by its provisions, uncontrolled and unaffected by the rules of the court upon that subject. It was not intended by the adoption of the 8th, 9th, 10th and 11th rules, to confine the discovery of documentary evidence to the two cases mentioned in the 8th rule. *Exchange Bank agt. Montleath and others*, 280.

EXECUTION, in all suits pending when the code took effect, the time of issuing executions therein must be governed by the laws then in force. *Merritt agt. Wing*, 14.  
 an irregularity in issuing execution is waived by the defendant's consent, *id.*  
 the 283d and 284th sections of the amended code, in relation to issuing executions, are applicable as well to judgments rendered before the code took effect, as those rendered in actions under it. Now in all cases executions may be issued immediately upon perfecting judgment, and at any time within five years thereafter, without leave of the court. *Catskill Bank agt. Sanford*, 101.

see SURPLUS MONEYS; *Brewster agt. Cropsey*, 219.

an execution may issue against the person of a judgment-debtor, where the judgment was recovered for *crim. con.* with plaintiff's wife. *Delamater agt. Russell*, 234.

an execution issued under the old law, upon a judgment docketed under that law and returned unsatisfied, a *second* or *pluries* may issue without an order of the court, though more than five years may have elapsed since the entry of judgment. *Pierce agt. Craine*. (*This seems to differ from the views in Catskill Bank agt. Sanford*, 101,) 257.

EXECUTORS AND ADMINISTRATORS, see COSTS; *Snyder agt. Young*, 217.

EVIDENCE, in an action by husband and wife, brought to recover damages for an injury to the person of the wife, the defendant is at liberty to prove that the act

EVIDENCE—*continued.*

- complained of was done by the consent and request of the wife, and if such facts are proved, they constitute an entire defence. *Pillow and Wife agt. Bushnell*, 9.
- an inquisition of a lunatic or drunkard is only presumptive evidence of incapacity, as to acts done by him before the issuing of a commission, and which are overreached by the retrospective finding of the jury. *In the matter of Patterson, a drunkard*, 34.
- principles on granting new trial for newly discovered evidence, stated. *Seeley agt. Chittenden*, 265.
- Documentary Evidence.* see DISCOVERY; *Exchange Bank agt. Monteath and others*, 280.

FEEs AND DISBURSEMENTS, such as are allowed by law, may be recovered by the prevailing party in actions of libel and assault and battery, where damages are under \$50. (*There are adverse decisions on this question.*) *Taylor agt. Gardner*, 67.

in proceedings for claims against estates, where a reference is had under the 36th section of the statute relating to the duties of executors and administrators, and a report is made in favor of the claimant or plaintiff, he is entitled (under the code) to the necessary disbursements and fees of officers allowed by law, including the compensation of referees, against the executors, although the court may have adjudged that he was not entitled to costs against the executors. *Newton agt. Sweet*, 134. (*This case agrees in principle with the above, p. 67.*) 134.

a witness examined before a referee in a proceeding supplementary to execution, in pursuance of § 295, 300, is entitled to fees as a witness, as allowed by statute. See WITNESS; *Davis agt. Turner*, 190.

the necessary disbursements and fees of officers allowed by law under the code, cannot be recovered by the prevailing party, where he is not entitled to recover costs. *Bekling agt. Conklin*, 196.

(*This case is adverse to Taylor agt. Gardner, p. 67, and Newton agt. Sweet, p. 134.*)

a district attorney cannot charge but two subpoenas for the same witness during the entire trial or trials. *Matter of B. Slosson, Dist. Atty.*, 236.

a witness is entitled to travel fees from his temporary residence, if subpoenaed and attends court from such residence. *Clarks agt. Staring*, 243.

in an action of slander, where the plaintiff recovered less than \$50 damages, held, that he was not entitled to recover the fees of officers and disbursements, in addition to the amount of costs equal to the verdict. *Wheeler agt. Westgate*, 269.

(*This case is adverse to Taylor agt. Gardner, p. 67, and Newton agt. Sweet, p. 134, and concurs with Belding agt. Conklin, 196.*)

GUARANTY, a guaranty for a valuable consideration of "a full and perfect performance of the agreement on the part of E. T.," (being a contract executed by E. T. for

GUARANTY—*continued.*

the delivery of flour.) *Held*, that the contract and the guaranty should be considered as one contract, and the respective signers regarded jointly liable, as principal and surety. *Enos agt. Thomas*, 48.

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HABEAS CORPUS, see ATTACHMENT AND POWER; *In the matter of Smethurst*, 369.

HUSBAND AND WIFE, in an action by both for assault, &c. on the wife, the defendant cannot require the wife to testify as a witness. *Pillow and wife agt. Bushnell*, 9.

the common law rule, declaring the wife incompetent to testify as a witness, either for or against her husband—not changed by the code, *id.*

the husband and wife are necessary parties in an action for the foreclosure of a mortgage, executed by them, (and also the bond,) to secure a part of the purchase-money, for premises conveyed to the wife in fee, subsequent to the act of April 7, 1848. *Conde agt. Shepard*, 75.

the second section of the act of April 7th, 1848, (Sees. Laws, 1848, p. 307,) allowing a married woman the exclusive control and disposal of her real and personal property, subject to the existing debts of her husband, declared unconstitutional and void. *White agt. White*, 102.

in an action for divorce by the husband against the wife for adultery, she is entitled to an allowance for her support pending the litigation, and a further sum to enable her to defend the action, if she denies, on oath, the charge of adultery. *Hallock agt. Hallock*, 160.

a wife cannot sue her husband, *without a next friend*, except in a single case of a suit for an absolute divorce. *Coit agt. Coit*, 232.

*Held*, that under § 114 of the code, the wife may properly bring a suit *alone*, (without a next friend,) against her husband for a limited divorce for cruel treatment. *Tippel agt. Tippel*. (This is directly adverse to *Coit agt. Coit*, above,) 346.

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IMPRISONMENT, a party cannot be imprisoned for non-payment of the costs on a motion for a new trial after judgment. *Buzard agt. Gros*, 23.

see EXECUTION; *Delamater agt. Russell*, 234.

see ACTIONS; *Burkle agt. Ellis*, 288.

INJUNCTION, what the requisites to be stated in the complaint to authorize an injunction to issue upon motion, under § 192 of the first code. *Hovey and wife agt. M'Cre*, 31.

courts of equity will interfere by injunction to restrain waste or trespass and to prevent injury to land, where it appears that irreparable mischief and the destruction of the substance of the inheritance will ensue, even where the title is in dispute and the right is doubtful. *Spear agt. Outter*, 175.

a defendant cannot defend himself against an application for an attachment,

INJUNCTION—*continued.*

for doing an act in disobedience of an injunction, on the ground that he acted by the authority and direction and for the benefit of a third person, who, he alleges, has become entitled since the service of the injunction to do the act complained of. *Krom agt. Hogan*, 225.

it is a sufficient answer to a motion to vacate an injunction that the defendant is in contempt for disobeying it, *id.*

where a defendant moves to vacate an injunction on an answer, verified as required by the amended code, it will be considered as made upon affidavit, and the plaintiff may oppose on affidavits and papers in addition to those on which the injunction was granted, *id.*

an injunction cannot now be issued in one action to stay the prosecution of another in this court. *Dederick agt. Hoyeradt*, 350.

how a stay in such cases should be had, *id.*

INDICTMENT, an indictment found on a penal statute, should state the *precise words* of that part of the statute defining the offence. It is settled law that equivalent words are insufficient. *People agt. Van Pelk*, 36.

INFANTS, a next friend not necessary, nor liable for costs only in cases where the infant is *sole plaintiff*.

a suit must be commenced *in the name* of the infant—sole plaintiff—to entitle the defendant to security for costs. A defendant is not entitled to security for costs where the husband and an infant wife sue jointly. *Hulburt and wife agt. Newell*, 93.

an attorney is only liable for the costs (\$100) where the defendant could have required security to be filed, *id.*

IRREGULARITY, an irregularity in issuing execution is waived if the defendant consent to the issuing. *Merritt agt. Wing*, 14.

as between the plaintiff and defendant, a judgment was held regular, where it appeared the capias was returned as though personally served by the sheriff; although it appeared in fact, it was not served on the defendant at all; but if served it was on the wrong person. There being no affidavit of merits, and the motion being made on the ground of irregularity merely. *Anonymous*, 112.

it is irregular for a complaint to be sworn to before the *plaintiff's attorney*, but it cannot be treated as a nullity. The remedy is by motion to set it aside. *Gilmore agt. Hempstead*, 153.

a complaint and affidavit, sworn to before the *plaintiff's attorney*, are irregular. Subject to amendment. *Anonymous*, 290.

an undertaking of sureties, given on a claim for property should be proved or acknowledged, *id.*

IRRELEVANT AND REDUNDANT MATTER, must be such as cannot be reached by demurrer, and also prejudicial to the adverse party, to authorize it to be stricken out. *White agt. Kidd*, 68.

every irrelevant or redundant expression or clause in a pleading will not be stricken out on motion; effect must be given to the word "*aggrieved*," in the 160th section of the code. *Hynds agt. Griswold*, 69.

IRRELEVANT AND REDUNDANT MATTER—*continued.*

what rules necessary to be applied in striking out irrelevant and redundant matter. *Knowles agt. Gee*, 317.

an order of a single justice, refusing to strike out matter as irrelevant and redundant in a pleading, is not an appealable order to the general term. *Bedell agt. Stickles*, 432.

*it seems*, that the rule in relation to striking out irrelevant and redundant matter should be in analogy to that of the old Supreme Court in relation to frivolous demurrers. Where there is *some question* or ground for *argument* about it, the application should be refused, *id.*

JUDGMENT, judgment may be entered upon a report of referees upon the whole issue, without the aid of a judge. *Van Valkenburgh agt. Allendorph*, 39.

see PRACTICE; *Norbury agt. Seeley*, 73.

judgment upon a report of referees, how reviewed. *Leggett agt. Mott*, 325.

a decision of the court upon a demurrer is not an order but a judgment. *Bentley agt. Jones*, 335.

JURISDICTION, see ACTIONS; *Hulbert agt. The Hope Mutual Ins. Co.*, 275.

the trial of a feigned issue in the Supreme Court on a question of fact, refusing to admit a will to probate by a surrogate, does not give jurisdiction to the Supreme Court, on appeal to the general term, from an order of a single judge denying a motion to set aside the verdict on the feigned issue. The surrogate has jurisdiction of the *merits*. *Matter of Hicks' will*, 316.

the court has no jurisdiction of a cause, to grant relief, &c. *before* the service of the summons. There is no action pending. (§ 139.) *Davis agt. Jones*, 340.

a *return to a certiorari*, made by a judge who was out of office before the service of the certiorari upon him, is a nullity. Otherwise with a justice of the peace. *Peck agt. Foot*, 425.

when an inferior court may inquire into the jurisdiction of a superior court. *Doty agt. Brown*, 429.

JURY, the verdict of a jury upon a question of fact, when final. *Rice agt. Floyd*, (*in Court of Appeals*), 27.

JUSTICE'S COURT, under the code of 1849, a reply to an answer in a justice's court is not necessary in any case. The cause is at issue without it. *McNamara agt. Bitley*, 44.

LEASES, see TAXES AND ASSESSMENTS; *Van Rensselaer agt. Cottrell*, 376.

*Van Rensselaer agt. Wilbeck*, 381.

*Van Rensselaer agt. Dennison*, 390.

a sixth sale (or quarter sale) reservation, contained in a lease in fee, is void; otherwise in a lease for years or for lives. *Overbagh agt. Patric*, 394.

LEASES—*continued.*

where the payment of such sixth sale is made a condition subsequent, the condition is void, and the estate stands divested of such condition. *Overbagh agt. Patrie*, 394.

LUNATIC OR HABITUAL DRUNKARD, cannot make a valid will, where a commission has been issued and remains unrevoked, without permission of court. *In the matter of Patterson, a drunkard*, 34.

acts done by a lunatic or drunkard, before the issuing of a commission, and which are overreached by the retrospective finding of the jury, the inquisition is only presumptive evidence of incapacity. But all gifts and contracts made by him after the actual finding of the inquisition, and until he is permitted to assume the control of his property, are utterly void, *id.*

an application to the court for an order to remove the commission, is addressed to its discretion, and may be made *ex parte* or on notice, to the committee and next of kin, as the court shall direct, *id.*

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MISTAKES, the omissions or mistakes of a clerk, attorney, or other officer of the court, will not be allowed to prejudice or injure a party. *Neale agt. Berryhill*, 16.

MORTGAGE FORECLOSURE, see PARTIES; *Conde agt. Shepard*, 75.

MOTION, may be noticed for a day in term, other than the first, on sufficient excuse. *Whipple agt. Williams*, 28.

motion for costs at circuit (attendance, &c.) should be made the first opportunity after circuit, *id.*

the court, upon motion, will not determine the equitable rights of parties as between themselves, in rendering judgment under § 274 of the code. *Norbury agt. Seeley*, 73.

to change the place of trial, &c. See TRIAL, 81, 86.

motions are properly made in a cause, in the district (or an adjoining county) in which the venue is laid, although the cause may have been tried in another district by an order of the court, changing the place of trial. *Gould agt. Chapin*, 185.

see TRIAL; *id.*

a motion to set aside a judgment upon matters of substance (not for mere technical irregularity,) is not required to be made the first possible opportunity. *Lucas agt. The Baptist Church*, 353.

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NON-RESIDENT, see ATTACHMENT; *Burrows agt. Miller*, 349.

see TAXES AND ASSESSMENTS; *Van Rensselaer agt. Cottrell and others*, 316 to 390.

NOTICES, notice of argument for Court of Appeals calendar should be mailed or sent so as to reach the clerk within the time prescribed by the rules (8 days.) *Willin agt. Pearce*, 26.

NOTICES—*continued.*

notice of commissioners' proceedings in partition, is not required by statute to be given to the parties. *Row agt. Row*, 133.

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ORDERS, see PRACTICE; *Schenck agt. McKie*, 246.

see PRACTICE; *Brodhead agt. Brodhead*, 308.

what orders involve the merits, and are appealable from the special to the general term. *St. Johns agt. West*, 329.

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PARTIES, the husband and wife, who execute a bond and mortgage to secure a part of the purchase-money, for premises conveyed to the wife in fee, subsequent to the act of April 7, 1848, are necessary and proper parties to an action for the foreclosure of a mortgage. *Conde agt. Shepard*, 75.

it seems a person, not a party to the judgment, may be made a party to supplementary proceedings. (Code, § 295, 300.) *Davis agt. Turner*, 190.

PARTITION, the old suit in equity for the "*partition of lands*" is now merged in the "*civil actions*" under the code, and as such may be prosecuted by summons and complaint. *Myers agt. Rasback*, 83.

proceedings for partition by petition under the Revised Statutes are saved by the code; and such proceedings may also be instituted now as before the code, *id.*

see PLEAS AND PLEADING; *Reed agt. Child*, 125.

notice of commissioners' proceedings in partition, is not required by statute to be given to the parties. *Row agt. Row*, 133.

PARTY IN INTEREST, every action must now be prosecuted by the *real party in interest*. *The Camden Bank agt. Rogers*, 63.

action by a bank upon a draft payable to the order of W. B. S., their cashier, and the complaint alleged that it was delivered to the said W. B. S., cashier "*for the said bank.*" *Held*, on demurrer to the complaint, that the action was well brought in the name of the bank, *id.*

PAYMENT, the amount of a *verdict* rendered in an action of assault and battery, cannot be paid to the sheriff on an execution against the party who recovered the verdict under § 293 of the code. A verdict in *tori* must be consummated by judgment before it can be treated as an *indebtedness* under that section. *Davenport agt. Ludlow*, 337.

PER CENT., ten per cent. was allowed on the amount of the verdict at the circuit in a suit upon a promissory note, where the defendant put in a false answer, by which the plaintiff was thrown over a circuit. *Willard agt. Andrews*, 65.

in the allowance of a per cent. under § 308 of the code, each case must depend upon its own peculiar features and circumstances, &c. *Sackett agt. Ball*, 71.

PER CENT.—*continued.*

where it appeared one bill of costs might have been saved to the defendant, by joining two suits in one, a per cent. was denied to the plaintiff. *Sackett agt. Ball*, 71.

*it seems*, that the allowance of a per cent. should be denied in all doubtful cases and granted only in those which, on account of their peculiarities or difficulties, plainly distinguish them from the great mass of litigated suits. *Gould agt. Chapin*, 185.

a referee's *certificate* is not such evidence as will authorize the court to allow a per cent. under § 308. The court must know the facts, *id.*

the court, and not the referee, must make the order for an extra allowance under § 308 of the code. The application cannot be made *ex parte*. *Howe agt. Muir*, 252.

a trial of a case which occupies four or five days, and in which it is necessary to procure scientific witnesses to disputed questions, comes within the meaning of § 308 of the code, as *extraordinary*, and entitled to an extra allowance. *Howard agt. The Rome and Twain Plank Road Co.*, 416.

*it seems*, that *any trial*, which necessarily occupies four or five days, and which comes under that section, is entitled to an extra allowance, *id.*

a defendant who is entitled to costs in consequence of judgment against him for less amount than he offered in writing, under § 385, is not entitled to an extra allowance, under § 308 and 309. *M'Lees agt. Avery*, 441.

PLEAS AND PLEADING, title set up by answer in a justice's court, by which the same action is commenced in the Supreme Court, and the same answer interposed. A reply interposed in such a case will be stricken out as unnecessary. *McNamara agt. Ditchy*, 44.

under the code (1848,) a reply to an answer in a justice's court is not necessary in any case, *id.*

*held*, no cause of demurrer to a complaint, because the plaintiff claimed a *sum certain* an account of the defendant's breach without setting out an *account current* with the defendants. The requisites of a complaint in such a case stated. *Enos agt. Thomas*, 48.

see IRRELEVANT AND REDUNDANT MATTER. *White agt. Kidd, and Hynds agt. Griswold*, 68 and 69.

a *demurrer* under the code must distinctly specify the grounds of objection; unless it do so, it may be disregarded, § 145. *Glenny agt. Hitchins*, 98.

a *complaint* should contain a statement of the facts constituting the cause of action in ordinary language, &c.; that is, all the facts which upon a general denial, the plaintiff would be bound to prove, to entitle him to a judgment, *id.*

although it is a general rule that a pleading will not be stricken out on motion as false, where it is verified by the oath of the party: yet, where a new and equivocal formula and unaccustomed words are averred, by which a real issue is not produced nor probably intended; such a pleading does not come within the rule. *Mier agt. Ferguson*, 115.

a pleading cannot aver the *evidence or the circumstances of the case in detail* under the code any more than under the old system. *Shaw agt. Jayne*, 119.

where a complaint, in an action for false imprisonment, stated at great length all the circumstances in detail, *held*, that it should all be stricken out, *id.*  
in proceedings by petition for partition under 2 R. S. 316. The pleadings are



PLEAS AND PLEADING—*continued.*

intended to be like those in a personal action, in which the petition shall stand for a declaration, and anything may be pleaded which will abate the action or bar the petitioner's right to a judgment. *Reed agt. Child*, 125.

under the 157th section of the code, *any* pleading verified by oath requires all subsequent pleadings to be likewise verified, whether the complaint is verified or not. *Levi agt. Jakeways*, 126.

*it seems*, that a pleading served which may be treated as a nullity, should be immediately returned, *id.*

see DEMURRER; *Millard agt. Shaw*, 137.

see ANSWER; *Davis agt. Potter*, 155.

an amended pleading takes the place of, and supersedes the original. An amended complaint may be served of course, at any time within twenty days after an amended answer is served. *Seneca County Bank agt. Garlinghouse*, 174.

an allegation in a pleading that a party to an action is not the real party in interest, is bad upon demurrer, for the reason that the allegation does not involve a traversable fact, but merely a conclusion of law. *Bentley agt. Jones*, 202.

where a defendant is allowed to answer on payment of costs, the court will not impose the further condition that the defendant shall not set up the defence of usury. *Grant agt. McCaughin*, 216.

see COMPLAINT; *Durkee agt. The Saratoga and Washington R. R. Co.*, 226.

when facts material to the defence occur, after the joining of issue, leave will be given, on motion, to set them forth in a supplemental answer; and the plaintiff will have twenty days to reply to such supplemental answer. *Radley agt. Houghtaling*, 251.

the question of pleading under the code, in reference to striking out irrelevant and redundant matter, reviewed. *Knowles agt. Gee*, 317.

see ANSWER; *Kellogg agt. Church*, 339, and *Russell agt. Clapp*, 347.

a defendant cannot both demur to, and answer at the same time, a single cause of action alleged in the complaint. *Stocum agt. Wheeler*, 373.

a claim for money, had and received, cannot be joined in a complaint, with a claim founded on a refusal to deliver up promissory notes, alleged to have been paid and satisfied. *Cahoon agt. The Bank of Utica*, 423.

**POWER**, the power of the court to relieve against a default, is derived from the common law. *Allen agt. Ackley*, 5.

the court has power under the 149th section of the code (original) to allow a complaint to be verified by oath, after service, upon motion. *Bragg agt. Bickford*, 21.

the court has, as one of its incidental powers, the right to control the legal acts, and compel a performance of legal duty of all its inferior officers; consequently has a right to review the adjustment and settlement of costs by a clerk. *Whipple agt. Williams*, 28.

the court has power under the 388th section of the code, (1849,) in any case to compel the discovery of books and papers bearing upon the merits of the action, where either party have them in their possession, &c. *Powers agt. Elmendorf*, 60.

POWER—*continued*.

- the court has no power to grant relief in a cause, *before* the service of the summons. There is no action pending. *Davis agt. Jones*, 340.
- a judge under § 302 of the code, has power to punish as for a contempt all disobedience of orders made by him in "proceedings supplementary to the execution." An attachment issued by him for such contempt, may, therefore, properly be made returnable before him, *at his office*. *In the matter of Smethurst*, 369.
- although the code gives the power of punishing disobedience of his orders to the judge, reference must be had to the Revised Statutes, as to the mode in which that power is to be exercised, *id.*
- an attachment may issue in the first instance under this statute, against the party, to appear and answer, or an order to show cause may be granted, *id.*
- a justice at special term has the power to hear and decide a motion for a new trial, on the ground that the verdict is against evidence. *Lusk agt. Lusk*, 418.

PRACTICE, in rendering judgment under section 274 of the code, (which gives authority to determine the rights between the plaintiffs or defendants, as between themselves,) the provision therein should be confined to parties *actually litigating* before the court. *Norbury agt. Seeley*, 73.

in an action on contract for the recovery of money only, where there is a failure to answer, the clerk in ascertaining the amount, the plaintiff is entitled to recover, (§ 246,) should make and file with the judgment-roll a report of his finding; analogous to the former practice of making and filing reports upon assessment of damages. *Squire agt. Ellsworth*, 77.

The form of an affidavit of merits upon a motion to change the place of trial, should correspond with the former practice and decisions. *Lynch agt. Mosher*, 86.

the *entitling the affidavit in a suit*, may now be disregarded under § 176 of the code, as not affecting the substantial rights of the adverse party. *Pindar agt. Black*, 95.

a final decree regularly entered, (not enrolled,) cannot be corrected on *special motion*; it must be done on a *rehearing*. If enrolled it must be by bill of review. *Picabia agt. Everard*, 113.

the court will not suffer the plaintiff to dismiss his bill after a decree, *unless upon consent*, *id.*

An *appeal* to the special term on a bill of exceptions taken at the circuit, under the code, is irregular, *where the suit was commenced before the passage of the code*. The bill of exceptions in such case must be argued pursuant to the former practice, although judgment may have been entered. *Clark agt. Crandall*, 127.

where an appeal is taken from an order of the surrogate, and the petition of appeal is filed within the time prescribed by the rules of court, (15 days,) an application to the court under the former (83d) rule to dismiss the appeal by a party interested, who has not been made a party to the petition of appeal, must be made *upon notice*. *Suffern agt. Lawrence*, 129.

an *ex parte* application to dismiss such an appeal, can only be made where the petition of appeal has not been filed in time, (15 days); not where any of the proper parties have been omitted in the petition, *id.*

## PRACTICE—continued.

Notice of commissioner's proceedings in partition, is not required by statute, to be given to the parties. *Ross agt. Ross*, 133.

an order from a county judge, staying proceedings, with a view to a motion to change the place of trial, does not by the 47th rule, prevent the plaintiff from entering judgment, unless there is some special clause to that effect. *Schenck agt. McKie*, 246.

the old practice of moving on a case or bill of exceptions, to set aside a verdict or non-suit and all the proceedings to review, by the Supreme Court at general term, &c., are still in force in all suits commenced before the code took effect, and must be pursued in such cases. *Thompson agt. Blanchard*, 260.

a case cannot be turned into a bill of exceptions or special verdict after judgment of the Supreme Court upon it, without a stipulation to that effect at the trial, or its being made a part of the order or entry of the verdict. *Smith agt. Caswell*, 286.

a motion may be made to refer a cause under § 270 of the code, immediately on receiving a reply to the answer. The party is not bound to wait twenty days to see if the defendant will amend his answer. *Enos agt. Thomas*, 290.

after the lapse of a reasonable time (it seems, twenty-four hours,) for the service of the copy complaint, after demand, pursuant to § 130, if not served, the defendant may move for judgment, dismissing the complaint. Analogous to the old practice for judgment of *non pros.* for non-service of bill of particulars. It may also be dismissed under § 274 of the code. *Littlefield agt. Murin*, 306.

an order made by a judge at chambers, enlarging the time to answer, is an extension of the time to demur. *Brodhead agt. Brodhead*, 308.

the practice in relation to reviewing reports of referees is, to make a case and appeal from the judgment on the matters of law involved, or apply for a stay of proceedings upon the report, for the purpose of moving for a re-hearing, (on a case at special term.) *Leggett agt. Motz*, 326.

if the report be complained of as against evidence, there is no redress except by a motion for a re-hearing, *id.*

upon a trial of a question of fact by the court, the prevailing party, on filing the decision of the judge, may enter his judgment immediately, under § 267 of the code. *Lynde agt. Covenhoven*, 327.

the party desiring to make a case, must get an order to stay; and when the case is made and settled it can be annexed to the judgment-roll, and thereby constitute a part thereof, as required by § 281, *id.*

a motion to set aside a judgment upon matters of substance (not for mere technical irregularity) is not required to be made the first possible opportunity. *Lucas agt. The Baptist Church*, 353.

an official statute certificate, signed by a deputy clerk, is valid, although it is not expressed and does not appear that the clerk was absent. The legal presumption is that the deputy has done his duty, and that the clerk was absent, *id.*

a slight variance between the original and copies of papers not calculated to mislead, will not void, *id.*

a defendant in a criminal case is bound to furnish, upon bill of exceptions,

PRACTICE—*continued.*

*printed papers for a hearing, the same as in other cases. The People agt. —, 417.*

an appeal from a *surrogate's* order, admitting or refusing to admit a will to probate, should in the *first instance* be heard at general term. *Watts agt. Aikin, 439.*

REAL ESTATE, see ACTIONS; *Waldorph agt. Bortle, 358.*

the 38th section of 2 R. S. p. 300, authorizes the court to vacate a judgment in an ejectment and grant a new trial, &c. on certain terms. *Held*, that the same section applies to a judgment in an action to recover the possession of real estate under the code. *Cooke agt. Passage, 360.*

RECEIVER, see CORPORATION; *Conro agt. Gray and others, 166.*

to authorize the appointment of a receiver under § 298 of the code, the proceeding should be against the debtor, to reach his property generally, and should be upon *notice* to the debtor. Such an appointment is not authorized on an examination under § 294 of third persons as to property of the debtor in their hands. *Kemp agt. Harding, 178.*

REFERENCE AND REFEREES, judgment may be entered upon the report of referees upon the whole issue without the aid of a judge. *Van Valkenburgh agt. Allendorph, 39.*

if power can be given to a referee to dispose of the question of costs in equity suits pending on the 1st July, 1848, the authority should be distinctly expressed in the order of reference, *id.*

a referee's report to set aside as irregular, on the ground that the referee, pending the hearing, examined personally a piece of machinery, the utility of which was the subject of litigation, and received explanations from one of the parties' witnesses, the other party not being present. *Yale agt. Gwinits, 253.*

a motion may be made to refer a cause under § 270 of the code, immediately on receiving a reply to the answer, and the party is not bound to wait twenty days to see if the defendant will amend his answer. *Enos agt. Thomas, 290.*

a referee to whom the whole cause is referred, has power and is required, in cases falling under § 306 of the code, to decide the question of costs. *Graves agt. Blanchard, 300.*

his power in this respect is the same as that of a judge of this court at special term, *id.*

*held*, that a hearing at special term is not necessary to authorize the granting of a new trial for errors of fact alone in a report of referees. Such errors may be reviewed and corrected on appeal. *Pepper agt. Goulding, 310.*

(see reporter's note to the case of *Lusk agt. Lusk*, p. 418, where the same judge comes to a different conclusion, as to reviewing judgments upon reports of referees upon questions of fact.)

*held*, that the practice in relation to reviewing reports of referees is, to make a

REFERENCE AND REFEREES—*continued*.

case and *appeal* from the judgment on the matters of *law* involved, or apply for a stay of proceedings upon the report for the purpose of *moving for a rehearing* (on a case at special term.) *Leggett agt. Mott*, 325.

REHEARING, see TRIAL, REFEREES; *Pepper agt. Goulding*, 310.

*held*, that the practice in relation to reviewing reports of referees is to make a case and *appeal* from the judgment on the matters of *law* involved, or apply for a stay of proceedings upon the report for the purpose of *moving for a rehearing* (on a case at special term.) *Leggett agt. Mott*, 325.

if the report be complained of as against *evidence*, there is no redress except by a *motion for a rehearing*, *id.*

see TRIAL; *Graham agt. Milliman*, 435.

SCIRE FACIAS, by § 428 of the code, the writ of *scire facias* is abolished, and the remedies provided by § 283 and 284 substituted therefor. *Catskill Bank agt. Sanford*, 100.

SERVICE, a service of summons by publication under § 135 of the code, will not be ordered where it appears that the defendant was within sight and hearing of the officer, but kept too far off to enable the officer to serve the summons upon him personally, but near enough to be informed that the officer had a summons for him. *Van Rensselaer agt. Dunbar*, 151.

it could not be said that the defendant could not be found, and kept concealed, &c. *id.*

where the service of a paper is made by mail, in pursuance of § 410 of the code, it must be deposited in the post office at the *residence of the attorney making the service*, addressed to the person on whom it is to be served, at his place of residence, and the postage paid. When this is done the service is complete, and the party to whom it is addressed takes the risk of the failure of the mail. *Schenck agt. McKie*, 246.

see ACTIONS; *Hulbert agt. The Hope Mutual Ins. Co.*, 275.

see TIME; *Judd agt. Fulton*, 298.

the service of a paper by mail is good, although deposited in the post office on the last day for service, *after the mail has closed*, if otherwise sufficient. *Noble agt. Trotter*, 322.

SET-OFF, an attorney's lien for costs must yield to the equitable right of set-off. *Ferguson agt. Bassett*, 168.

if the right of set-off exists at the time of the assignment, the assignee takes subject to all equitable as well as legal claims which might be urged against the assignor at the time of the assignment. And this right exists against the attorney's lien for costs, although the attorney may be the assignee, *id.* the right of set-off does not exist against a verdict merely; it is only in cases of *judgments* obtained, *id.*

SHERIFF, it is the duty of a sheriff to return process to the proper office. If he does not

**SHERIFF**—*continued.*

do so personally, he must see that it is done. If sent by mail, he must *pay the postage* on the letter containing it. *Jenkins agt. McGill*, 205.

a clerk is not required to take a letter from the post office containing process returned by a sheriff, where the postage is unpaid, *id.*

see **SURPLUS MONIES**; *Brewster agt. Cropsey*, 219.

a sheriff not entitled to double costs under the code. *Hallenbeck agt. Miller*, 239.

(*There are adverse decisions on this point.*)

in an action against the sheriff for the escape of the judgment-debtor, committed on a *ca. sa.*, it is no defence to the sheriff that such debtor, after the escape, and before the commencement of the action against the sheriff, departed this life. *Tanner agt. Hallenbeck*, 297.

the cause of action is complete when the escape takes place, liable, however, to be defeated by the voluntary return of the judgment-debtor before suit brought, *id.*

such voluntary return is matter of defence, and the sheriff takes the risk of the death of the debtor, *id.*

**STATUTE**, where a penal statute is repealed, the penalty is gone, *though the repeal takes place while the prosecution for it is pending.* *People agt. Van Pelt*, 36.

the amended (2d) code should be construed to take effect *twenty days after its passage.* *Gamble agt. Beattie*, 41.

the second section of the act of April 7, 1848, (Sess. L. 1848, p. 307,) allowing a married woman the control and disposal of her property real and personal, except the husband's debts to which it was liable at the passage of the law, &c. declared *unconstitutional and void.* *White agt. White*, 102.

section 460 of the code, which provides that an appeal may be taken from a final decree, &c. pending in the Supreme Court on the *first day of July, 1847*, held to apply to cases pending on the *first Monday of July, 1847.* The section was not unconstitutional. It merely extended the time for bringing an appeal. It affected the remedy only. *Burch agt. Newbury*, 145.

**SUMMONS**, a summons issued without any court whatever being named in it, (the complaint naming it,) held, that it might be amended under § 173, 176. *Walker agt. Hubbard*, 154.

see **ACTIONS**; *Hulbert agt. The Hope Mutual Ins. Co.*, 275, 415.

see **ACTIONS**; *Lucas agt. The Baptist Church*, 353.

**SURETIES**, their liabilities and privileges as endorsers of a promissory note, sued jointly under the common money counts with copy note annexed, where one only pleaded, stated. *Bradford agt. Corey*, 161.

where sureties sign several bonds for the protection of the rights of different infants, in the same proceeding, they should justify in the *aggregate* amount of the penalties of the several bonds. *Anonymous*, 414.

**SURPLUS MONIES**, a mortgagee, who is junior in lien to a judgment-debtor (of the mortgagor) upon whose execution the mortgaged premises are sold, is entitled to the surplus moneys to the amount of his mortgage, although junior judgment-creditors of the mortgagee may have had executions in the sheriff's

SURPLUS MONEYS—*continued.*

hands prior to, and at the time of the sale, and the premises were purchased at the sale by the mortgagee. The statute relating to the redemption of lands sold upon execution, does not apply to such a case. *Brewster agt. Cropsey*, 219.

a different rule might prevail as to the mortgagee, if the sale was made upon all the executions, junior as well as senior, to the mortgage, *id.*

**TAXES AND ASSESSMENTS**, villages incorporated under the act of Dec. 7, 1847, may raise a tax at *any time*, in conformity with the provisions of that act. They are not limited in making the assessment, &c. as required under the general tax law. *Village of Cohoes agt. The Cohoes Company*, 343.

assessors have jurisdiction and may legally assess, to the owner or occupant, "all lands under water," reserved to the owner in leases in fee. *Van Rensselaer agt. Cottrell*, 376.

there is no statute designating the manner in which lands, owned by a *non-resident* of the town or ward, and *occupied* by others, shall be assessed, *id.* duties of assessors, supervisors and collectors in assessing, regulating and collecting taxes of residents and non-residents. Their proceedings generally. *Van Rensselaer agt. Witbeck*, 381.

the *tenant or lessee* not liable for the payment of the taxes on the *landlord's or lessor's ground rent*, reserved upon premises leased in fee. *Van Rensselaer agt. Dennison*, 390.

a sixth sale (or quarter sale) reservation, contained in a lease in fee, is void; otherwise in a lease for years or for lives. *Overbagh agt. Patrie*, 394.

where payment of such sixth sale is made a condition subsequent, the condition is void and the estate stands divested of such condition, *id.*

**TIME**, double time (40 days) allowed for serving an amended answer or reply, of course, and without costs. *Washburn agt. Herrick*, 15.

service of notice on Saturday for Monday, to settle and adjust costs, held insufficient (intended as a two days' notice.) *Whipple agt. Williams*, 28.

in the computation of time for service of notice of motion, &c. *five days* is sufficient (under the first code) for any number of miles under one hundred. *Hovey and wife agt. McCrea*, 31.

in computing statute time the first day, or the day on which the time begins to run, is to be excluded. *Judd agt. Fulton*, 298.

where an act is to be done *within* a given time, *e. g.* thirty days, the party has all of the thirtieth day to perform it. But if it is to be done *after* the expiration of the thirty days, it cannot be performed till on the thirty-first day. The law takes no notice of fractions of a day, *id.*

*it seems*, that *twenty-four hours* is a reasonable time for a service of a copy of the complaint, after demand, pursuant to section 130 of the code. *Littlefield agt. Murin*, 306.

if the complaint is not served within such time the defendant may move for judgment dismissing the complaint, *id.*

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the time for appealing begins to run on service of notice of the entering the judgment. *Bentley agt. Jones*, 335.

TRIAL, change of place, &c. *Beardsley agt. Dickerson*, 81.

motion to change place of trial, need not be made until issues joined. (There are adverse decisions to this point.) It should be made the first opportunity after joining issue. *Lynch agt. Mosher*, 86.

the form of an affidavit of merits, upon such a motion, should correspond with the practice and decisions heretofore made, *id.*

an order to change the place of trial does not carry with it a change of venue.

Nor change the place of *making motions* in the cause. *Gould agt. Chapin*, 185.

*motions* are therefore properly made in a cause, in the district (or an adjoining county,) in which the venue is laid, although the cause may have been tried in another district, by an order of the court changing the place of trial, *id.* it seems that there is no statute under which the court can order an *issue of law* to be tried out of the county originally specified in the complaint, or that substituted under § 126 of the code, *id.*

after the service of an answer, the defendant may move to change the place of trial before the service of a reply, and before the expiration of the time to reply. *Myers agt. Feeter*. (There is a diversity of opinion upon this point; whether a motion to change the place of trial can be made until *all the issues are joined*.) 240.

a motion to change the place of trial may be made *before* issue has been joined in the cause. *Schenck agt. McKie*. (*This is adverse to Myers agt. Feeter*, p. 240, *above*.) 246.

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a change of the place of trial is not effected by the defendant's merely serving a demand in writing that the trial be had in the proper county under § 126 of the code. *Hasbrouck agt. McAdam*, 342.

to change the place of trial, application must be made to the court by one party or the other, and either may make it, *id.*

a motion to change the place of trial cannot be made *before* issues joined. So held by the whole court in the eighth judicial district. *Mizer agt. Kuhn*, 409.

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a justice at special term has the power to hear and decide a motion for a new trial, on the ground that the verdict is against evidence. *Lusk agt. Lusk*, 418.

where a cause has been tried without a jury, or by a referee, a review upon evidence appearing upon the trial, either of the questions of *fact* or of *law*, can be heard before a special term; such terms having power to grant or refuse a new trial. *Graham agt. Milliman*, 435.

such review is brought before the court by a case made and settled according to the rules of the court, *id.*



SURPLUS MONEYS—*continued.*

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a motion to change the place of trial cannot be made *before* issues joined. So held by the whole court in the eighth judicial district. *Mixer agt. Kuhn*, 409.

see PER CENT.; *Howard agt. The Rome and Turin Plank Road Co.*, 416.

a justice at special term has the power to hear and decide a motion for a new trial, on the ground that the verdict is against evidence. *Lusk agt. Lusk*, 418.

where a cause has been tried without a jury, or by a referee, a review upon evidence appearing upon the trial, either of the questions of *fact or of law*, can be heard before a special term; such terms having power to grant or refuse a new trial. *Graham agt. Milliman*, 435.

such review is brought before the court by a case made and settled according to the rules of the court, *id.*

TRIAL—*continued.*

a bill of exceptions taken on the trial, or in pursuance of § 268 and 272 of the code, is parcel of the record and can be heard only at general term. *Graham agt. Milliman*, 435.

a case reserved under § 264 and 265 can be heard only at special term, either upon the judge's notes or upon a case, as he shall direct, *id.*

a rehearing is a proceeding different from a bill of exceptions, case reserved, or motion for a review, and is to be understood in the sense in which the term was used prior to the code, *id.*

what costs are recoverable on a case reserved, motion for review, or rehearing.—*Quære, id.*

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VENUE, an order to change the place of trial does not carry with it a change of venue, nor change the place for making motions in the cause. *Gould agt. Chapin*, 185.

motions are therefore properly made in a cause, in the district (or an adjoining county in which the venue is laid, although the cause may have been tried in another district, by an order of the court changing the place of trial, *id.* see TRIAL; *id.*

VERDICT, the verdict of a jury upon a question of fact, upon the trial of which there is a question as to the credibility of the witnesses by which it is sought to be proved, is a final determination of the case. A court will not interfere. (In Court of Appeals.) *Rice agt. Floyd*, 27.

the amount of a verdict rendered in an action of assault and battery, cannot be paid to the sheriff, on an execution against the party who recovered the verdict, under § 293 of the code. A verdict in tort must be consummated by judgment, before it can be treated as an indebtedness under that section. *Davenport agt. Ludlow*, 337.

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WILL, a lunatic or habitual drunkard cannot make a valid will, without permission of the court, where a commission has been issued and remains unrevoked. The existence of the commission will be held conclusive against the will. *In the matter of Patterson, a drunkard*, 34.

WITNESS, a person incompetent to testify from any cause, cannot be made a competent witness under the code by being made a party to the record. *Pillow and wife agt. Bushnell*, 9.

a person examined as a witness before a referee, in a proceeding supplementary to an execution, in pursuance of § 295 and 300 of the code, is entitled to fees as a witness, as allowed by statute, (*Laws of 1840*, p. 331, § 8.) His remedy to collect such fees, &c. *Davis agt. Turner*, 190.

where a witness fails to attend in pursuance of his recognizance, he may be proceeded against by attachment, the same as if he had been subpoenaed. *In the matter of B. Slosson, Dist. Atty*, 236.

a witness is entitled to travel fees from his temporary residence, if subpoenaed and attends court from such residence. *Clarks agt. Staring*, 243.

7540. 16 *Q. A. H. P.*

1. The first part of the document is a list of names and dates, which appears to be a record of some kind. The names are written in a cursive script, and the dates are in a more formal, printed style. The list is organized into two columns, with names on the left and dates on the right. The names are: John Smith, James Brown, William Jones, and Thomas White. The dates are: 1810, 1811, 1812, and 1813. The list is followed by a section of text that is also written in cursive. This text appears to be a description of the events that took place during the period covered by the list. It mentions the names of the individuals listed and describes their actions and the circumstances surrounding them. The text is written in a clear, legible hand, and it is organized into paragraphs. The first paragraph describes the events of 1810, the second paragraph describes the events of 1811, the third paragraph describes the events of 1812, and the fourth paragraph describes the events of 1813. The text is followed by a final section of text that appears to be a summary or conclusion of the events described in the list. This text is also written in cursive and is organized into a single paragraph. The entire document is written on a single sheet of paper, and it appears to be a handwritten record of some kind. The paper is aged and shows signs of wear, including some staining and discoloration. The handwriting is in a cursive script, which is typical of the early 19th century. The overall appearance of the document is that of a historical record or a personal journal.





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